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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

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**On Appeal From the United States District Court for the Eastern District of Kentucky**

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## JURISDICTIONAL STATEMENT

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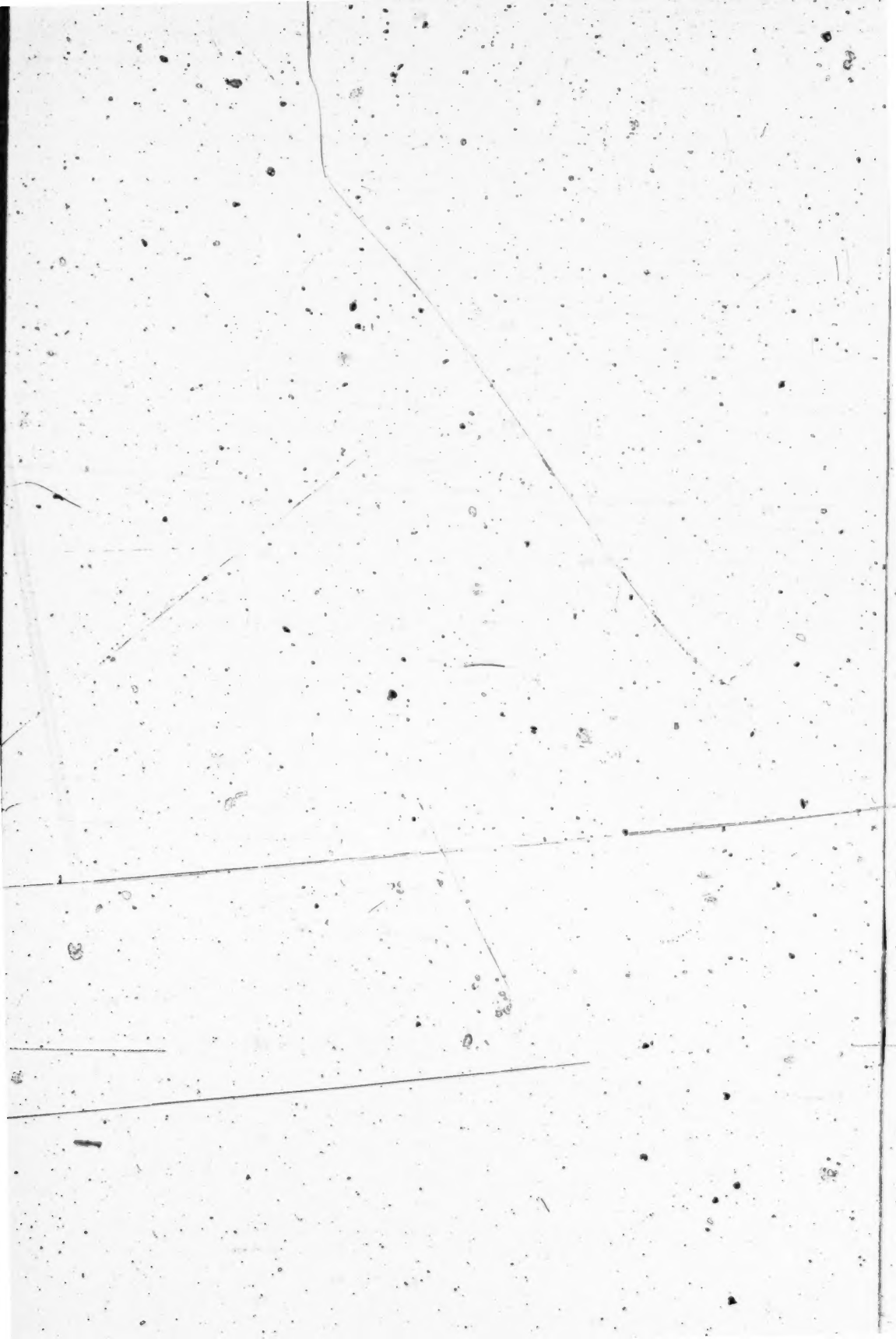

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the district court (App. B, *infra*, pp. 2a-8a) is unreported. A district court opinion of February 1, 1967, in this case (App. F, *infra*, pp. 15a-19a) was incorporated by reference in the opinion below; it is reported at 263 F. Supp. 268. This Court has written two previous opinions in this case; they are reported at 376 U.S. 665 and 382 U.S. 34.

## JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin violations of Sections 1 and 2 of that Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2.

The judgment (captioned "order") of the district court denying appellant-intervenor's motions that the court (a) not accept a proposed consent judgment, (b) reconsider its decision of February 1, 1967, and (c) grant the prayers for relief in appellant-intervenor's complaint (App. A, *infra*, p. 1a) was entered on December 29, 1967. On the same day the court entered appellees' proposed consent judgment (App. D, *infra*, pp. 10a-14a).

Appellant Central Bank and Trust Company—an intervenor in the court below—filed a notice of appeal in the United States District Court for the Eastern District of Kentucky on January 16, 1968.[1] The jurisdiction of this Court rests on Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

## STATUTES INVOLVED

(1) Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides in pertinent part as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

[1] Dages I. Boyle, who also intervened in the court below, noticed a separate appeal on the same day. Boyle also has filed a separate Jurisdictional Statement in this Court.

> trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

(2) Section 2(a) of the Bank Merger Act of 1966, 80 Stat. 7, reads as follows:

> Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

## QUESTIONS PRESENTED

(1) Whether the district court erred in entering a consent decree settling this litigation without the consent of appellant who had intervened in the proceeding as of right to oppose entry of the decree, and without affording appellant an opportunity, after it had become a party, to participate in relief hearings and settlement negotiations.

(2) Whether the district court erred in entering that consent decree in circumstances where (a) the facts developed at trial demonstrated to a high degree of probability that the challenged bank consolidation constituted a combination to monopolize in violation of Section 2 of the Sherman Act; (b) the consent decree does not require divestiture, and the court found that the relief it does provide effected "a ninety percent capitulation" to the defendants by the United States; (c) the court made no determination that the decree would protect the public interest in competition and

dissipate the harmful effects of the combination; and (d) the court ruled as a matter of law that it "should" enter the consent decree merely because there was "no showing of bad faith on the part of the United States" and its decision would likely be appealed to this Court.

(3) Whether Section 2(a) of the Bank Merger Act of 1966 violates the principle of separation of powers and is therefore unconstitutional insofar as it "conclusively presumed" to have been lawful under Section 1 of the Sherman Act a bank consolidation which, prior to enactment of the statute, this Court had found in violation of Section 1 and as to which the district court had entered a final decree of divestiture.

## STATEMENT

This is an appeal from a judgment of the district court accepting in settlement of this case a consent decree jointly proposed by the defendants and the United States. Appellant intervened in the proceeding below for the purpose of moving that the court reject the proposed consent decree and require divestiture of the merged banks. The pertinent facts and background of the case are set forth below:[2]

(1) Appellant Central Bank and Trust Company ("Central") is engaged in the commercial banking business in Fayette County, Kentucky; it (and its predecessors) have been so engaged for more than twenty-five years. Prior to the consolidation of First

[2] The portions of the record cited in this Jurisdictional Statement are primarily contained in Volumes 8, 9 and 10. The clerk of the district court did not paginate the record consecutively; he numbered (in blue pencil) the first page only of each separate document. We identify cited documents by their "blue" numbers and title: *e.g.*, Doc. 222, Kincaid Affidavit, p. 5.

National Bank and Trust Company of Lexington ("First National") and Security Trust Company ("Security Trust"), Central competed with each of them in the obtaining of deposits and trust funds and the making of loans. Presently, Central endeavors to compete with the bank created by the consolidation, First Security National Bank and Trust Company of Lexington ("First Security"). (Doc. 222, Kincaid Affidavit, pp. 1-5.)

(2) This case began when the United States filed a complaint in early 1961 alleging that the consolidation of First National and Security Trust violated Sections 1 and 2 of the Sherman Act. After trial on the merits the district court dismissed both counts of the complaint. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D. Ky. 1962). On appeal, this Court reversed, holding that "[w]here, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act." *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665, 672-73 (1964).

This Court's holding was based on subsidiary findings that in the commercial banking market in Fayette County, Kentucky (*id.* at 669)—

> [t]he bank established by the consolidation was larger than all the remaining banks combined:

| | *Assets* | *Deposits* | *Loans* |
|---|---|---|---|
| First Security .... | 52.70% | 51.95% | 54.20% |
| Citizens Union .... | 17.06 | 16.78 | 16.41 |
| Bank of Commerce. | 12.99 | 13.32 | 14.46 |
| Central Bank ..... | 9.14 | 9.66 | 8.85 |
| Second National ... | 8.10 | 8.30 | 6.09 [;] |

that "[p]rior to the consolidation, First National and Security Trust had been close competitors in the trust department business," holding "[b]etween them . . . 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts"; that "the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there"; and that, as competitor banks testified, "the consolidation will seriously affect their ability to compete effectively over the years." The Court concluded, after appraising the above facts, that the violation of Section 1 of the Sherman Act was "clear." 376 U.S. at 669-70. Finally, the Court stated, "[i]n view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2." 376 U.S. at 673.

(3) The case was remanded to the district court to formulate an appropriate decree. The district court then entered a series of orders, on joint motions of the United States and the defendants, extending until February 16, 1965, the time within which the parties were to present an appropriate plan of relief (*e.g.*, Doc. 150-52, 159-62). On March 18, 1965, the district court, acting pursuant to a joint motion of the United States and the defendants, entered a judgment of divestiture. (App. G, *infra*, pp. 20a-22a.) This judgment was "clarified" by an order entered April 29, 1965,[3] which provided in part as follows (App. H, *infra*, pp. 22a-23a):

> Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, com-

[3] The order of clarification was entered upon defendants' motion, in which the United States "concurred" (App. H, *infra*, p. 22a).

> petitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington . . . .

No steps of record were taken by defendants to implement this decree of divestiture (see App. B, *infra*, p. 4a). The divestiture decree became final when defendants' time to appeal expired.

(4) More than nine months after entry of the clarification order, on February 21, 1966, Congress enacted the Bank Merger Act. Section 2(a) of the Act provides that:

> Any merger [or] consolidation . . . involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the [Sherman] Act . . . .

Thereafter, the United States moved in the district court for an adjudication that the consolidation of First National and Security Trust violated Section 2 of the Sherman Act (Doc. 202). In a supporting memorandum the Government "concede[d] that the statute [Bank Merger Act] is applicable to the merger of the defendants," and that it "creates a conclusive presumption that the merger did not violate Section 1 of the Sherman Act, and removes the legal support for the presently outstanding order of divestiture . . ." (Doc. 203, Memorandum of Plaintiff, p. 4).

Focusing on the combination to monopolize charge of its complaint, the United States contended that the Bank Merger Act "did not change the legal consequences of a violation of Section 2 of the Sherman Act" (*ibid.*, fn. omitted). It argued that the combination creating First Security was unlawful under Section 2 on two separate grounds. The narrower ground was "that to combine more than ninety percent of the assets held by corporate fiduciaries is to 'monopolize' the corporate trust administration market" (*id.* at 6). The broader ground was that the merger was a combination to monopolize the entire "commercial banking" market in Fayette County (*id.* at 5):

> "As a result of the merger, First Security (a) holds about 53 percent of the county's demand deposits, 46 percent of its commercial and industrial loans, 71 percent of its single-payment loans, and more than 88 percent of its FHA Title I loans; (b) has almost total control of trust service (more than 95 percent of the trust assets held by corporate fiduciaries in the county), which gives it a tremendous advantage in obtaining commercial banking business; and (c) is about three times as large as the next largest bank in the county, and has even greater supremacy over its other competitors. It is plaintiff's position that this tremendous strength and supremacy in this market constitutes monopoly power in any meaningful sense of the term.

The district court (on February 1, 1967) "overruled" the Government's motion, holding that "[s]ince the Supreme Court did not reverse the decision of this court on Section 2 of the Sherman Act, that ruling is the law of the case" (App. F, *infra*, p. 17a). The court observed that re-examination of the Section 2 decision

would be "questionable under any circumstance" and confusing to laymen (*ibid.*). As an alternative basis for its decision the court ruled that (*id.* at 18a)—

> it is my judgment that it was the intention of the Congress by the enactment of the Bank Merger Act to immunize this particular merger from all further attacks on the ground that it violated the law.

(5) The United States filed a timely notice of appeal to this Court and obtained several extensions of time for docketing the appeal (*e.g.*, Doc. 210-13, 231-32). Subsequently, on September 5, 1967, the United States and the defendants filed in the district court a stipulation that they had reached agreement upon a proposed decree to settle the Section 2 count. However, the United States reserved the right to withdraw its consent at any time within forty days. (App. C, *infra*, p. 9a.)

Ten days later, on September 15, 1967, appellant filed a complaint against defendants and applied for leave to intervene as a party plaintiff for the purpose of moving that the court (a) reconsider the issues concerning Section 2 of the Sherman Act, (b) not enter the proposed consent judgment, and (c) hold the Bank Merger Act unconstitutional and reinstate the March 18, 1965, divestiture decree (Doc. 216-18).

Appellant's central objection to the relief provisions of the proposed consent decree was that they would not dissipate the anticompetitive effects of the combination for—unlike the 1965 decree remedying the Section 1 violation—the new decree did not provide for divestiture. The substantive provisions of the consent judgment are injunctions prohibiting, for a period of

ten years, the acquisition of any other commercial bank in Fayette County, Kentucky (¶ III); limiting, for a period of five years, the number of branches First Security may establish (¶ IV); and prohibiting, for a period of ten years, the acquisition of any new non-testamentary trust business (¶ V), unless First Security's market share is first reduced to a stated percentage (¶ VI) (App. D, *infra*, pp. 12a-13a).

(6) After oral argument on appellant's motions the district court, on December 29, 1967, issued an order granting its motion to intervene and providing that the "plaintiff-intervenors' complaints, tendered on September 15, 1967 are ordered filed as of that date. . . ." The court, however, denied appellant's other motions as well as the prayers for relief in its complaint. (App. A, *infra*, p. 1a.)

While entering the proposed consent decree the court expressed serious concern about the adequacy of the relief provided in the decree and the Government's representation of the public interest in agreeing thereto. The court stated that although "[t]here has been no showing of bad faith on the part of the United States . . ." (App. B, *infra*, pp. 6a-7a)—

> I do seriously question its judgment in not permitting this case to go to a final decision by the Supreme Court. The plaintiff here had consistently taken the position that the action of these two banking institutions was unlawful and contrary to the public interest of the Lexington community. It was eventually sustained in this position by the Supreme Court. When the Congress sought to legislate the question by the enactment of the statute referred to, the United States again vigorously challenged the sufficiency of the statute to cover the issues presented by the record in this court. Its

> position was overruled and it proceeded to take an appeal. Suddenly, and I may assume without warning to anyone, the plaintiff makes about a ninety percent capitulation and now becomes the advocate of the merger.

The court recognized that the United States generally may compromise cases in which it is a party, but doubted the propriety of this particular compromise, coming as it did at an advanced stage of the litigation, after trial, and after this Court had found that the combination eliminated direct and substantial competition in "clear" violation of the antitrust laws (*id.* at 7a). Nonetheless, the court entered the decree because it believed that even in "cases of this magnitude" it could refuse to accept a consent decree only if bad faith had been shown and, in any event, an appeal to this Court was likely (*id.* at 7a, 8a).

Focusing on the other issues raised by appellant, the court ruled that the Bank Merger Act was constitutional, and it refused to rule on the Section 2 charges "for the reasons set forth in its opinion" of February 1, 1967 (App. B, *infra*, pp. 7a-8a).

(7) Soon after the district court's decision appellant noticed its appeal to this Court (Doc. 262), and the United States dismissed its appeal (Doc. 264).

## THE QUESTIONS ARE SUBSTANTIAL

The judgment of the court below, entered with the agreement of the Government, perpetuates the consolidation of the largest and fourth largest banks in Fayette County, Kentucky—a consolidation which created a bank more than three times the size of its nearest competitor; larger than all other banks in Fayette County combined; and accounting for almost 95 percent of the corporate trust business in the area, as well

as 53 percent of the area's demand deposits. As the United States previously observed in this case, the Court has not been presented with an antitrust proceeding involving the combination of such direct and substantial competitors "since the railroad merger cases in the 1920's" (Jurisdictional Statement in No. 590, O.T. 1962, pp. 9-10, fn. omitted).[4] In these circumstances it is obvious that if the consent judgment is permitted to stand competition in commercial banking in Fayette County will be stifled for the foreseeable future. The decision below raises questions of marked importance concerning the power and duty of lower courts to refuse to approve consent decrees wherein the United States proposes—at the "crucial" "remedial phase" of important cases—to settle for less than adequate relief. See *United States* v. *duPont & Co.*, 366 U.S. 316, 322-23 (1961).

This appeal also raises an important question about the constitutional power of Congress to enact a statute which has the effect of vacating a final judicial decree. The issue concerning the insulation of final judicial decrees from retroactive encroachment by Congress is important not only to reaffirm a basic principle of constitutional law; it is also of immediate importance in enforcement of the antitrust laws. The precedent set by the banking lobby in obtaining enactment of the Bank Merger Act of 1966 shows signs of inspiring other groups toward a like course. For example, S.

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[4] The market shares held by the consolidated banks and the market concentration ratios involved in this case stand well among the highest of the more than 200 mergers challenged by the Government from 1951 through July 1, 1967. See *The Celler-Kefauver Act: Sixteen Years of Enforcement*, Staff Report to Antitrust Subcommittee of House Committee on the Judiciary, 90th Cong., 1st Sess., pp. 44-67 (Appendices B and C) (1967).

1312, 90th Cong., 1st Sess., presently pending before the Senate Committee on the Judiciary, if enacted, will require vacating of all final antitrust decrees granting relief against unlawful combinations of newspaper companies (Section 5(a)).

(1) The district court permitted appellant to intervene as of right in this proceeding, properly recognizing that its interests as well as the interests of the public were not adequately being represented by the United States (App. B, *infra*, p. 6a). At the same time it allowed intervention the court entered the consent decree which appellant had intervened to oppose (*id.* at 8a). This was plain error.

An intervenor has all the rights of an original party. 4 Moore's *Federal Practice* ¶ 24.16[b], p. 124 (2d ed. 1967). Among those rights is the right to prevent settlement by refusing to sign a "consent decree" terminating the litigation. "[A]n intervenor is a party for purposes of all future orders, and can appeal, raise new issues, *and prevent settlement.*" *The Supreme Court 1966 Term,* 81 Harv. L. Rev. 69, 223 (1967) (emphasis added).

This precise point has been utilized by courts to justify denial of intervention in specific circumstances. As one court recently put it (*United States* v. *Chicago Title & Trust Co.*, 10 F.R. Serv. 2d 731, 736 (N.D. Ill. 1966)):

> As [defendant] points out there can be no consent decree without consent . . . and should [the applicant] be permitted to intervene the consent of both parties would be lost.

See also *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), aff'd *per curiam*, 19 L.

ed. 2d 781 (1968). The Government itself, in its brief in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), acknowledged the same principle, arguing that " a successful intervenor, having the rights of a party, could block such a [consent] judgment and insist on a litigated proceeding" (Brief for the United States in Nos. 4, 5 and 24, O.T. 1966, p. 21). Continuing, the Government argued that (*id.* at 32-33, fns. omitted)—

> if appellants were improperly denied intervention, the relief proceeding in the court below must be reopened, and an adversary hearing held at which appellants will have the right to introduce evidence, to cross-examine the witnesses of the government and of the defendant and, if they are dissatisfied with the decree entered by the district court on the basis of the new hearing (a likely eventuality), to appeal to this Court.

The right of intervenors to prevent consent settlements accords fully with the purpose of Rule 24(a)(2), F.R. Civ. P., to allow intervenors themselves to protect interests which, as a practical matter, may be impaired or impeded by the original parties' disposition of the action.[5] Indeed, such protection may well be impossible absent that right. In this case, for example, appellant's ability to protect the procompetitive interests which motivated its intervention has been seriously circumscribed by entry of the decree at the same time that

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[5] Rule 24(a)(2) requires that intervention be permitted as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

its status as a party was adjudicated. While appellant may be bound by the consent decree (see 4 Moore's *Federal Practice* ¶ 24.16 [6] (2d ed. 1967)), appellant has never been afforded an opportunity, as a party, to participate in relief hearings and settlement negotiations leading to a decree calculated to protect its interests and the legitimate interests of all concerned. Under the lower court's decision appellant's sole right is the right to appeal and undertake to establish error in the proceeding below. By so limiting the efficacy of appellant's status as a party, contrary to the intendment of Rule 24(a)(2), the court erred.

(2) Independent of the argument in Point (1) above, the court below also erred by taking too narrow a view of its power to refuse to accept a plan of relief which is agreeable to the United States but will not promote the public interest. While it is important that courts not interfere unduly with the right of the Government to settle cases, that right cannot be allowed to obliterate the right of the public to effective relief against unlawful conduct. It is our position that where, as here, a trial already has been held and the facts establish to a high degree of probability that the consolidation constitutes an unlawful combination to monopolize, and that the competitive harm caused by the consolidation has been and will continue to be extensive and irreparable without divestiture, the court must reject Government efforts to settle the case on terms which will not fully dissipate the harmful effects of the consolidation.[6]

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[6] As the Assistant Attorney General in charge of the Antitrust Division remarked in a recent speech about consent decrees, "the Government normally should resolutely refrain from settling for anything substantially less than what it believes it would be entitled to secure after an adjudication in its favor" (Address by

(*a*) In a suit brought to vindicate an important public policy, entry of a consent decree is not solely a matter of compromise between the parties; it is a judicial act requiring careful scrutiny of the court. Before approving such a decree the court must satisfy itself that the relief promotes the statutory objectives and accords with sound equitable principles. *E.g., United States* v. *Swift & Co.*, 286 U.S. 106 (1932); *Laughlin* v. *Berens,* 118 F. 2d 193, 195-96 (D.C. Cir. 1940). As this Court recently stated in *System Federation No. 91* v. *Wright,* 364 U.S. 642, 652-53 (1961):

> The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

Moreover, the fact that the United States is one of the consenting parties in a suit brought to enforce a federal statute does not mean that its views necessarily define the public interest. Mr. Justice Frankfurter emphasized in his dissent in *Chrysler Corp.* v. *United States,* 316 U.S. 556, 570 (1942), that—

> [a] court of equity is not just an umpire between two litigants. In a very special sense, the public interest is in its keeping as the conscience of the

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Donald F. Turner before the Association of the Bar of the City of New York, December 13, 1967) (ATRR No. 336 (December 19, 1967), p. x-2). Focusing specifically on divestiture as opposed to an injunction against future acquisitions, he said (*ibid.*):

> [I]n my view such settlements are plainly inadequate in any case where the Government is convinced that the merger was unlawful, and where there has been no precipitous change in the defendant's circumstances that may arguably make divestiture a pointless gesture. A policy of giving every dog one bite would make an intolerable inroad on effective enforcement of anti-merger law.

> law. The circumstance that one of the parties is the Government does not in itself mean that the interest which it asserts defines and comprehends the public interest which the court must vindicate.

The courts, in short, "must act 'in accordance with their own conviction, uninfluenced by the opinions of any and every other department of the Government.'" *United States* v. *Radio Corp. of America,* 46 F. Supp. 654, 655-56 (D. Del.), appeal dismissed, 318 U.S. 796 (1943). See also *United States* v. *Brunswick-Balke-Collender Co.,* 203 F. Supp. 657 (E.D. Wis. 1962).

The settled rule governing antitrust settlements is that, prior to entering a consent decree, the court itself must determine that the decree is equitable under all pertinent circumstances and that it promotes the public interest protected by the antitrust laws—"the public interest in competitive economic activity." See, *e.g., United States* v. *Swift & Co.,* 189 F. Supp. 885, 905 (N.D. Ill.), aff'd *per curiam,* 367 U.S. 909 (1961); *United States* v. *Blue Chip Stamp Co., supra,* 272 F. Supp. at 434; *United States* v. *Pan American World Airways,* 1959 Trade Cases, ¶ 69,300 (S.D.N.Y. 1959); *United States* v. *F. & M. Schaefer Brewing Co.,* 1968 Trade Cases ¶ 72,345 (E.D.N.Y. 1967). See generally Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,* 50 Mich. L. Rev. 1139, 1235 (1952).

In this case, the lower court entered the consent decree without affirmatively determining that the decree was equitable and in the public interest. Indeed, the court made findings which demonstrated that the decree was contrary to the public interest in competition, "seriously question[ing]" the judgment of the United States in agreeing thereto. It emphasized that this

Court had already found that "significant competition will be eliminated by the consolidation"; that the Government's agreement was a "ninety percent capitulation" to the defendants; and that, in entering into the agreement, the Government had become "the advocate of the merger." (App. B, *infra*, pp. 6a, 7a.)

Entering the decree despite the above findings, the court relied exclusively upon the following factors (*id.* at 7a, 8a):

> I may assume that the decision of this court will be reviewed by a higher court. . . .
>
> * * * * * *
>
> There has been no showing of bad faith on the part of the United States . . . .

In so ruling, the court below plainly erred as a matter of law. It had a duty not to enter the decree unless it could find that the relief would adequately restore the substantial competition eliminated by the consolidation. That duty was not performed by rubberstamping an inadequate decree to which the Government agreed in the exercise of good faith but poor judgment. Nor did the court perform its duty by passing along the issue to this Court. While decrees in antitrust cases have "always had the most careful scrutiny of this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959)), "the responsibility initially to fashion the remedy" has always been a duty of the district court (*United States* v. *duPont & Co.*, 366 U.S. 316, 323 (1961)).

(*b*) We demonstrate below that the consent decree entered by the district court manifestly is inadequate and inequitable, favoring the defendants at the expense

of the public. First, it is not only highly probable that the combination of First National and Security Trust violates Section 2 of the Sherman Act, it is almost certain. Secondly, considering the magnitude of that violation, divestiture is the only practicable remedy to restore the lost competition. Thirdly, the relief afforded by the consent decree is inadequate even when appraised solely within the decree's four corners.

(*i*) As this Court has found, First Security controls over 90 percent of all trust assets and earnings and almost 80 percent of all trust accounts in Fayette County. 376 U.S. 665, 669. Those facts alone demonstate that the consolidated bank has monopolized the county's corporate trust market. A combination monopolizing "any part" of commerce violates Section 2, and the existence of the requisite monopoly power "ordinarily may be inferred from the predominant share of the market." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Moreover, as Judge Learned Hand opined in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (2d Cir. 1945), it is hardly open to question that "to have combined ninety percent" of a market is to have monopolized that market.

The only legitimate issue as to trust services is whether they constitute a "part" of commerce within the meaning of Section 2. It is of course settled that even though the cluster of services constituting "commercial banking" is a relevant product market for antitrust purposes, corporate trust services considered separately may also be an economically significant part of commerce. *United States* v. *Grinnell Corp., supra* at 572; *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *United States* v. *Chas. Pfizer & Co.,* 1965 Trade Cases, ¶ 71,445, pp. 80, 948-49 (E.D.N.Y. 1965).

Corporate trust services standing alone constitute a relevant market because, in the language of *Brown Shoe, supra,* 370 U.S. at 325, they enjoy "public recognition . . . as a separate economic entity" and number "peculiar characteristics and uses" among their other unique attributes. In fact, the United States itself has so argued to this Court in this case (Jurisdictional Statement in No. 590, O.T. 1962, p. 19):

> [T]he undisputed facts show that corporate fiduciary services are often performed by institutions which are not commercial banks and that Security Trust was itself such an institution for many years; that corporate fiduciaries render a number of services not performed by individuals; that the only competition for Fayette County trust business in any realistic, commercial sense is among the county's commercial banks, since only the commercial banks advertise and actively solicit such business; that corporate fiduciaries have important characteristics peculiar to themselves, such as perpetual existence, specialized personnel, financial responsibility, government regulation, group judgment, constant accessibility, and impartiality; and that, indeed, Security Trust itself was originally organized by the businessmen of the community because of the need they had for a corporate fiduciary. It is also highly relevant that, in their analyses of this merger, both the Federal Reserve Board and the Federal Deposit Insurance Corporation discussed corporate trust business separately from commercial banking generally. [Citations omitted.]

Beyond this, it is highly probable that Security Trust's great dominance over all other banks in Fayette County renders the merger unlawful as a combination to monopolize all "commercial banking" services in that

area, as again the Government has repeatedly recognized (see Brief for the United States in No. 36, O.T. 1963, p. 55; Doc. 203, Memorandum for Plaintiff, p. 5).

(*ii*) Considering the merged bank's enormous market shares, divestiture unquestionably is the only practicable remedy to cure the competitive harm occasioned by the combination. Where the essence of an antitrust violation is a merger or acquisition it has long been recognized that even in a routine case adequate relief requires dissolution of the combination, for only then are the restraints upon competition dissipated and the defendants denied the benefits of their unlawful conduct. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128-29 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *United States* v. *duPont & Co.*, 366 U.S. 316, 326 (1961). "Divestiture has become the normal form of relief when acquisitions have been found to violate § 7 of the Clayton Act." *United States* v. *Times Mirror Co.*, 274 F. Supp. 606, 623 (C.D. Cal. 1967). That result is required *a fortiori* when a Section 2 violation of this magnitude is involved.

Indeed, the necessity for divestiture was recognized and advocated by the Government from the time it filed this case in March 1961 until it agreed to the September 1967 consent decree. As Government counsel argued to the district court in early 1965 (Doc. 182, Transcript of March 22, 1965, Hearing, p. 3):

> The government has consistently taken the position throughout this proceeding that recreation of a competitive entity to replace the one that disappeared as a result of the unlawful combination is the only effective relief in our view.

That statement echoed similar arguments previously made to this Court (Memorandum for the United States in Opposition to Motion to Remand in No. 36, O.T. 1963, p. 5):

> The violation charged in this case is an illegal combination of two banks. It would seem obvious that, if the combination is illegal, the only way to cure the illegality is to end the combination.

The district court's acquiescence in the Government's belated change of heart amounts to nothing more than the same sort of "knuckling under" which this Court deemed improper in *Cascade National Gas Corp.* v. *El Paso National Gas Co.*, 386 U.S. 129, 141 (1967).[7]

(*iii*) Analyzed solely on its own terms the consent decree entered by the court below is inadequate to protect the public interest. The decree (App. D, *infra*, pp. 10a-14a) contains three substantive provisions: Paragraphs III, IV and V. Paragraph III enjoins First Security for a period of ten years "from acquiring control over or merging with any other commercial bank having one or more offices in Fayette County, Kentucky" (*id.* at 12a). This prohibition is meaningless.

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[7] No argument can be made that divestiture is not possible or practicable. In fact, this Court has already rejected that precise argument. During the original appeal in this case defendants argued, after probable jurisdiction had been noted, that the case should be remanded to the district court to consider "problems of divestiture" (Affidavit of Leroy Miles in Support of Motion to Remand in No. 36, O.T. 1963, pp. 8-15). This Court denied that motion (376 U.S. 935 (1964)) after the United States opposed it and argued that the alleged problems would not be "insoluble" and that, in any event, "those problems relate to the form and method of divestiture, not to the need for it" (Memorandum for the United States in Opposition to Motion to Remand in No. 36, O.T. 1963, p. 6).

First Security, as a result of the consolidation, is larger than all remaining commercial banks in the area combined, holding over 50 percent of all bank assets, deposits and loans, over 90 percent of all trust assets and trust department earnings, and over 79 percent of all trust accounts. 376 U.S. at 668-69. There obviously is no commercial bank in Fayette County which First Security could acquire without running afoul of the antitrust laws. Paragraph III therefore amounts to no more than an inconsequential injunction not to violate the law.

Paragraph IV enjoins First Security "for five (5) years . . . from establishing any additional branch banking offices in Fayette County, Kentucky if, as a result . . . [it] would own or control more than one third of the total number of offices conducting a commercial banking business in Fayette County, Kentucky" (App. D, *infra,* p. 12a). This provision, if allowed to stand, will enable First Security to establish at least one additional commercial banking branch immediately (Doc. 218, Exhibit A to Central's Complaint, p. 6).

In addition, Paragraph IV was designed by the Government and the defendants to permit "First Security to expand and grow at the same rate for the next five years as it has during the past five years" (Doc. 222, Kincaid Affidavit, p. 5). Yet during all of the past five years the consolidation allegedly has been in violation of Section 2. To insure it of continuing its growth rate during those years is not to dissipate the unlawful effects of the consolidation, but, rather, is to assure that First Security will retain its overwhelming market dominance.

Paragraph V enjoins First Security for ten years from accepting new non-testamentary trust accounts,

except accounts of "any person (or spouse of any person) who is or at any time hereafter becomes an officer, director (including advisory directors) or employee of defendant First Security" (App. D., *infra*, p. 12a). This paragraph apparently is supposed to reduce First Security's almost total control of the market for trust department services. The provision is inadequate on its face, however, for it applies solely to non-testamentary trust accounts when "it appears that First Security's principal trust business is testamentary in nature" (Doc. 222, Kincaid Affidavit, p. 5).

Moreover, the provision contains a large loophole through which First Security can acquire a substantial amount of new non-testamentary trust business. This loophole is the exception for the accounts of advisory directors. Since the decree does not limit the number of such directors which First Security may appoint, it could validly name any number of persons as advisory directors in order to manage their non-testamentary trust assets.[8] Thus, Paragraph V is inadequate to dissipate the restraints on competition caused by the consolidation in both the testamentary and non-testamentary trust areas.

(*iv*) The district court's error in accepting this inadequate consent decree is in no way vitiated by the fact that, at the time the decree was entered, an order dismissing the Section 2 count of the complaint was outstanding in that court.[9]

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[8] Appointment of advisory directors by First Security would not be novel; the bank presently has a large number of such directors (Doc. 218, Exhibit A to Central's Complaint, p. 6).

[9] That order never became final because the United States filed a timely notice of appeal therefrom, which it dismissed only after the consent decree had been entered (see *supra*, pp. 9, 11).

First, the court's Section 2 decision (App. F, *infra*, pp. 15a-19a) was based upon technical considerations unrelated to the merits of the monopolization charge—*i.e.*, the court declined to re-examine the original decision dismissing the Section 2 charge (208 F. Supp. 457), and the court ruled that the Bank Merger Act was intended to absolve the defendants from all antitrust violations based upon the challenged combination. There would have been no inconsistency between those rulings and a determination, once the merits were considered, that the combination was in fact an egregious violation of Section 2 of the Sherman Act. In these circumstances, even assuming the correctness of the court's rulings, those rulings could not alter its duty to insist upon effective relief once the United States and the defendants decided to settle the case. Indeed, once the focus of the Section 2 litigation shifted from the illegality of the defendants' conduct to the propriety of a consent decree the court was bound, at the very least, to assume the validity of well pleaded allegations of the complaints. See *Kozak* v. *Wells*, 279 F.2d 104, 109 (8th Cir. 1960).

Secondly, the court's rulings are clearly wrong. Section 2(a) of the Bank Merger Act plainly and unequivocally states that it applies only to antitrust laws "other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)." Indeed, the entire statute was "intended to make clear that no merger which would violate the anti-monopoly section (sec. 2) of the Sherman Anti-trust Act may be approved under any circumstances." H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3 (1966).

Ordinarily, as a matter of comity, one district court should refrain from re-examining the judgments of

another district court. However, where exceptional circumstances make re-examination plainly essential to a proper result, a district court must undertake such a review in order to promote the orderly administration of justice. The court's failure to do so in the extraordinary circumstances of this litigation was error.

After the district court originally dismissed the Section 1 and Section 2 counts of the Government's complaint, the following events occurred: its judgment under Section 1 was reversed by this Court, which found a "clear" violation and deemed it unnecessary to reach the Section 2 issues; this Court clarified the standards applicable to bank mergers in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), reversing the district court decision (201 F. Supp. 348 (E.D. Pa. 1962)) which had come down prior to the district court opinion in the instant case; Congress passed the Bank Merger Act of 1966; and appellant offered to present new evidence relevant to the Section 2 charge (Doc. 222, Kincaid Affidavit, pp. 3-5).[10] This collocation of circumstances makes clear that the original decision under Section 2 was rendered in a context that has long since disappeared; that decision should have been re-examined. *E.g., Castner v. First Nat'l Bank*, 278 F.2d 376 (9th Cir. 1960); 1B Moore's *Federal Practice*, ¶ 0.404[4], pp. 452-55 (2d ed. 1965).

(3) As noted above, this Court, in 1964, ruled that the merger of First National and Security Trust "constitutes a violation of § 1 of the Sherman Act." *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665, 673. The Bank Merger Act, enacted in 1966, "conclu-

[10] Some of the new evidence would have revealed First Security's potential control over Second National Bank and Trust Company of Lexington, one of the few remaining banks in the county.

sively presumed" that all bank mergers occurring before June 17, 1963 "have not been in violation of any antitrust laws other than Section 2 of the [Sherman] Act . . ." (§ 2(a)). Thus, Congress has determined that the merger of First National and Security Trust does not (and never did) constitute a violation of Section 1 of the Sherman Act, in effect vacating this Court's final judgment of illegality and the district court's March 1965 final decree of divestiture (see *supra*, pp. 6-7). It is our position that Section 2(a) of the Bank Merger Act, as applied to the instant combination, is unconstitutional, for in its enactment Congress "passed the limit which separates the legislative from the judicial power." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147 (1872).

Article III, Section 1 of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Judicial power differs from legislative power in that (*Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908))—

> [a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Under the Constitution the courts do not have any legislative power, and Congress does not have "*any* judicial power, all of it having been vested in the courts." White, *Disturbing the Balance*, 85 U. Pa. L. Rev. 678, 681 (1937).

Congress therefore cannot "subject the judgments of the Supreme Court to [congressional or any other] re-examination or revision. . . ." *United States* v. *O'Grady's Executors,* 89 U.S. (22 Wall.) 641, 648 (1875). Nor can Congress "set aside the judgment in a case already decided. . . ." See *Pope* v. *United States,* 323 U.S. 1, 9 (1944). These restrictions on the power of Congress to vitiate final judicial decrees are essential to protect the constitutionally established independence of the separate branches of Government—an independence which requires that all three branches be "restrict[ed] . . . to the exercise of their appointed power . . . ," and that "in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.'" *O'Donoghue* v. *United States,* 289 U.S. 516, 530, 531 (1933).

Under the above principles Section 2(a) of the Bank Merger Act is unconstitutional, trenching upon the doctrine of separation of powers. Section 2(a) overruled this Court's final judgment declaring the merger of Security Trust and First National unlawful, and it did so after that final judgment of illegality had resulted in a final decree of divestiture. Thus, at the time the statute became operative, the Section 1 count of this case had been finally disposed of by the judiciary.

In making Section 2(a) inapplicable to bank merger cases in which final judgments had been rendered and divestiture already had been effected, Congress apparently recognized that the Constitution forbade it from interfering with the judicial process at that juncture. But there can be no constitutionally significant difference between a final judicial decree of divestiture

and a final judicial decree of divestiture with which the defendants have complied. The line beyond which Congress may not constitutionally pass must be drawn by judicial action, not the action of private parties. That line was drawn in this case by the district court's final judgment of divestiture.[11]

Rejecting appellant's argument on this point, the district court relied upon two cases: *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940) (App. B, *infra*, p. 8a). Both cases are distinguishable.

In *Wheeling Bridge* the Court had previously held that a bridge constituted an unlawful obstruction of interstate commerce and had ordered that the obstruction be abated. Thereafter, Congress passed a statute validating the bridge. The Court declined to enforce its decree, stating (59 U.S. at 432)—

> Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it [the bridge]? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

Enforcement of the Court's decree, in short, would have been futile because of the new statute. And the

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[11] Even in cases involving money judgments the power of the legislature to affect the judgments depends not upon whether they have been satisfied, but upon whether the last judicial act or event requisite to their finality has occurred. *E.g.*, *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

court therefore properly declined, in its discretion, to enforce the decree and insist upon a useless act.

No comparable problem exists here. The Bank Merger Act, unlike the statute in *Wheeling Bridge*, does not validate all future bank mergers. If Section 2(a) of the Bank Merger Act is declared unconstitutional as applied to the combination here, and the March 18, 1965, divestiture decree is accordingly reinstated, that will be the end of the matter. Any subsequent consolidation by First National and Security Trust would be adjudicated under the substantive standards of the antitrust laws—"Congress intended bank mergers first to be subject to the usual antitrust analysis"—as supplemented by the Bank Merger Act. *United States* v. *Third Nat'l Bank in Nashville*, No. 86, O.T. 1967, slip op. 10 (March 4, 1968). Therefore, the principles of *Wheeling Bridge* do not require vacation of the March 1965 divestiture decree.[12]

*Paramino Lumber* involved an administrative award of compensation for injuries. After the award became final, Congress passed a statute ordering the administrative agency to review the case "and to issue a new order" providing additional compensation for newly

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[12] This Court recently, in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), interpreted *Wheeling Bridge* as involving a proper application of *judicial discretion* not to enforce an outstanding decree. The Court in *Wright* ruled that the lower court had abused its discretion in refusing to modify a judicial decree prohibiting a union shop after Congress passed a statute permitting union shops. The Court stated that the lower court's inherent power to modify an outstanding decree was not in issue, citing *Wheeling Bridge*. 364 U.S. at 646. And it relied upon "[t]he principles of the *Wheeling Bridge* case . . ." to hold that the lower court erred in not exercising its discretion to modify the particular decree there involved. *Id.* at 650.

discovered permanent injuries. 309 U.S. at 375. This court upheld the statute as constitutional, ruling that by extending the time for filing claims before the agency, Congress merely "cure[d] a defect in administration. . . ." *Id.* at 378.

The Court was careful to point out in *Paramino Lumber,* however, that "[t]his private act does not set aside a judgment. . . ." *Ibid.* Section 2(a) of the Bank Merger Act, by contrast, sets aside a final judicial judgment and is therefore unconstitutional.

## CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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March 1968

## APPENDIX A

Dec 29 1967

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, *Defendants*

### Order

The motions of Central Bank and Trust Company and Dages I. Boyle for leave to intervene as parties plaintiff in order to file certain motions allegedly affecting them is sustained and the motions filed on September 15, 1967 are made a part of the record for the court's consideration and ruling.

The motions that the court not accept the proposed final judgment are overruled.

The motion to reconsider the court's decision of February 1, 1967 is overruled.

The plaintiff-intervenors' complaints, tendered on September 15, 1967 are ordered filed as of that date and the prayers of the complaints and each of them are denied.

See Opinion.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

Dec 29 1967

## APPENDIX B

### Opinion

This case has had a long and tortuous career. The record is now before the court on a stipulation between the plaintiff and defendants to enter a proposed final judgment which is tendered with the stipulation. Both the stipulation and the proposed final judgment are made a part of this opinion as appendages.

To give a detailed and comprehensive history of this case would add nothing to an understanding of the conclusions the court reaches here and would be but boring both to the litigants and their counsel who have been over these facts so many times. It is necessary, however, in order to properly establish the basis of the motions now before the court to give very briefly the steps by which the case has come to this point.

Lexington, Kentucky is a relatively small city. It is the center and heart of a rich agricultural section known as the Bluegrass region of Kentucky. Formerly there was relatively little industry in the locality and the principal business in Lexington and its environs was agriculture. While agriculture is still most likely the principal business of the region, many industrial plants have moved into Lexington and the surrounding county seat towns and have become a major source of the economic life of the locality. The First National Bank and Trust Company of Lexington and the Security Trust Company prompted by an idea, so they say, that big business requires big financing, arranged between themselves to merge their banking operations into one large commercial bank and trust company to be known as the First Security National Bank and Trust Company of Lexington. All preliminary steps were taken and the proposed merger was approved by the Comptroller of the Currency of the United States. The merger was consummated on March 1, 1961 and later

on the same day the United States filed its complaint against the two independent banking institutions, pursuant to Section 4 of the Sherman Act, seeking to enjoin alleged violations of Sections 1 and 2 of that Act. 15 U.S.C.A. 1, 2. By an amended complaint, filed on March 3, 1961, the First Security National Bank and Trust Company of Lexington was joined as a party to the action.

A trial was held in this court, at which the parties and all competitors were given an opportunity to be heard in opposition to the merger. The court was of the opinion that there was no violation of either Section 1 or Section 2 of the Sherman Act, but as a precautionary measure required, by order, that the defendants agree to keep separate their respective business transactions until the time for an appeal had expired, or, in the event of an appeal, until the case had been finally determined. The opinion of the trial court is found in the case of U. S. v. First National Bank & Trust Co. of Lexington, 208 F.Supp. 457.

The United States prosecuted an appeal and on April 6, 1964, the Supreme Court reversed the judgment of this court and held that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, violated Section 1 of the Sherman Act. It declined to review the question posed by the complaint under Section 2 of the Sherman Act and remanded the case to this court for further proceedings in conformity with its opinion. U. S. v. First National Bank & Trust Co. of Lexington, et al, 376 U. S. 665.

No steps were taken to effect a separation of the banking business of the First National Bank and Trust Company of Lexington and the Security Trust Company, being operated as the First Security National Bank and Trust Company of Lexington. This court was of the opinion that the defendants were ignoring the decision of the Supreme Court and deliberately delaying a compliance with its mandate and thereupon entered an order holding the

banks in contempt. An appeal was taken from this order and it was reversed by the Supreme Court on the ground that no order of divestiture had been entered and that therefore the defendants were not in contempt of any order of the court.

On March 18, 1965, this court entered a divestiture order which required the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Subsequently, on April 29, 1965, an order was entered clarifying in minor respects the order of March 18, 1965.

Before the divestiture, directed by these orders, was accomplished, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7, designated as the Bank Merger Act of 1966. Section 2 (a) of this Act provides as follows:

> "Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act (Feb. 21, 1966), shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) (section 2 of Title 15)."

After this statutory enactment there is no indication from the record that the defendants made any effort to comply with the orders of the court with respect to the matter of divestiture.

On April 28, 1966 the United States moved the court for an adjudication that the merger of the defendants

violated Section 2 of the Sherman Act because the Bank Merger Act does not apply to banks which are in violation of Section 2 of the Sherman Act. By order of February 1, 1967, the motion was overruled for reasons set forth in a written opinion. U. S. v. First National Bank & Trust Co., et al, 263 F. Supp. 268.

On March 30, 1967, the plaintiff filed a notice of appeal to the Supreme Court from the order of this court of February 1, 1967. So far as the court is advised no further steps were taken to prosecute the appeal and on August 7, 1967, the plaintiff and defendants filed the stipulation in this court consenting to the entry of a final judgment. See appendix.

On September 15, 1967 the Central Bank and Trust Company, a commercial banking institution of Lexington, Kentucky, filed a motion "for leave to intervene as a party plaintiff in order: (1) to move that the Court not accept the proposed Final Judgment prior to hearing Central Bank's motions to intervene and for other relief; (2) to move that the proposed Final Judgment not be accepted by this Court; and (3) to move that this Court reconsider its decision of February 1, 1967, upholding the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company resulting in the establishment of First Security National Bank and Trust Company of Lexington; and (4) to permit it to file the intervening Complaint attached hereto."

On the same date Dages I. Boyle, individually and as a representative of the First National Bank and Trust Company of Lexington and the Security Trust Company, filed his motion to intervene as a party plaintiff in order to oppose the entry of the final judgment. Dages I. Boyle is a citizen and resident of Fayette County, Kentucky, a stockholder in the defendant Security Trust Company and a stockholder in the First Security National Bank and Trust Company of Lexington.

Both the plaintiff and the defendants vigorously oppose the right of these two intervenors to be permitted to intervene and be heard on the question of the propriety of the entry of the stipulation and final judgment.

The court is of the opinion that both the petitioners should be permitted to intervene and thereby permitted to be heard in opposition to the proposed final judgment. I rest my decision on the case of Cascade Natural Gas v. El Paso Natural Gas, 386 U. S. 129, which I believe to be directly in point. If the Court by its decision in Cascade grants intervention of right to any volunteer claiming to speak for the public interest when he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit, these intervenors are well within the class entitled to intervene. The interpretation of the opinion is that made by a member of the Court who sat in the case. See dissenting opinion of Mr. Justice Stewart.

Equal justice under law means that any court action, whether civil or criminal, should be a satisfying experience to each litigant; not that each litigant would be satisfied with the results, but satisfied that his rights have been thoroughly and objectively considered. I do not mean to imply that the United States has not conscientiously represented the public interest, but I do seriously question its judgment in not permitting this case to go to a final decision by the Supreme Court. The plaintiff here had consistently taken the position that the action of these two banking institutions was unlawful and contrary to the public interest of the Lexington community. It was eventually sustained in this position by the Supreme Court. When the Congress sought to legislate the question by the enactment of the statute referred to, the United States again vigorously challenged the sufficiency of the statute to cover the issues presented by the record in this court. Its position was overruled and it proceeded

to take an appeal. Suddenly, and I may assume without warning to anyone, the plaintiff makes about a ninety percent capitulation and now becomes the advocate of the merger.

I do not question the right of the United States or any other public agency to compromise litigation in which it is involved, but I do believe that the United States should go very slowly in cases of this character where the whole community, comparatively small though it may be, is deeply concerned and especially where the Supreme Court in reversing the lower court said:

> ". . . we think it clear that significant competition will be eliminated by the consolidation. . . . ; that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.
>
> "We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade. . . ."

Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind. American justice is so constituted that not only should it be fair and impartial but the litigants and the public should know that it is fair and impartial.

I may assume that the decision of this court will be reviewed by a higher court and in order to give such reviewing court a ruling on all questions presented, with a hope of bringing the litigation to a conclusion within a reasonable time, I will proceed to rule upon each of the questions raised by the intervenors:

(1) The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. The litigation was not

final, notwithstanding the fact that an order directing divestiture had been entered, as the order itself retained the case on the docket for the purpose of guiding and determining whether or not any action on the part of the defendants contravened the directive of the order. Nothing had been done toward carrying out the orders of the court and no report of progress had been made of record. To deny the Congress the right to enact legislation finally settling a question of fact that was still open and subject to further orders of the court, would invite a criticism of ignoring the separation of powers assured by the Constitution to a much greater extent than is urged here by the intervenors in the criticism of the Congressional enactment involved. Paramino Co. v. Marshall, 309 U. S. 370. I believe the question is settled in the case of State of Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U. S. 421.

(2) The court declines to reconsider its ruling sustaining the merger on Section 2 of the Sherman Act for the reasons set forth in its opinion in U. S. v. First National Bank & Trust Company of Lexington, et al., 263 F. Supp. 268.

(3) There has been no showing of bad faith on the part of the United States and the final judgment submitted with the stipulation of August 7, 1967 should be entered and it is this day signed by the court.

An order in conformity with this opinion is this day entered.

Dec 29 1967

/s/ Mac Swinford
Mac Swinford, *Judge*

## APPENDIX C

### Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that paragraphs (1) and (2) of the stiplation filed on August 7, 1967, are amended as follows:

(1) The parties consent that a Final Judgment in the form attached may be filed and entered by the Court at any time after the expiration of forty (40) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of forty (40) days by serving notice thereto upon the other parties hereto and filing said notice with the Court.

Dated: September 1, 1967

For The Plaintiff:

/s/ Edwin M. Zimmerman
Edwin M. Zimmerman
*Acting Assistant*
*Attorney General*

/s/ William H. McManus
William H. McManus
*Attorney,*
*Department of Justice*

/s/ W. D. Kilgore, Jr.
William D. Kilgore, Jr.

/s/ Charles L. Whittinghill
Charles L. Whittinghill
*Attorneys,*
*Department of Justice*

Filed: September 5, 1967

For The Defendants:

Arnold & Porter by
/s/ Victor H. Kramer
Victor H. Kramer

## APPENDIX D

### Final Judgment

Plaintiff, United States of America, having filed its complaint herein on March 1, 1961, pursuant to Section 4 of the Sherman Act seeking to enjoin alleged violations of Sections 1 and 2 of the Sherman Act, and defendant First Security National Bank and Trust Company of Lexington, having appeared and filed its answer to such complaint, denying the substantive allegations thereof, this Court (Judge Ford) on July 30, 1962, after trial, having entered judgment for defendants holding that no violation of the Sherman Act had been shown (208 F. Supp. 457), plaintiff having appealed to the Supreme Court of the United States, the Supreme Court having on April 6, 1964 reversed the judgment of this Court and having held that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company violated Section 1 of the Sherman Act and having declined to review the questions posed by the complaint under Section 2 of the Sherman Act, and having remanded the case to this Court for further proceedings in conformity with its opinion (376 U.S. 665), the Bank Merger Act (Public Law 86-463, 74 Stat. 129) having been amended on February 21, 1966 (Public Law 89-356, 80 Stat. 7), plaintiff on April 28, 1966 having filed its motion in this Court for an adjudication that the aforesaid merger violates Section 2 of the Sherman Act, this Court on February 1, 1967, having filed its order denying said motion and having filed its opinion upholding said merger, plaintiff on March 30, 1967, having filed its notice of appeal to the Supreme Court of the United States, plaintiff and defendant First Security National Bank and Trust Company of Lexington, by their respective attorneys, having each consented to the making and entry of this Final Judgment without this Final Judgment constituting any evidence or an admission by either party hereto with respect to any issue of fact or law herein, and

this Court having considered the matter and being duly advised.

Now, therefore, upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed, as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against First Security National Bank and Trust Company of Lexington under Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "First Security" means defendant First Security National Bank and Trust Company of Lexington which is a consolidation of defendant First National Bank and Trust Company of Lexington and defendant Security Trust Company.

(B) "Trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as (1) trustee; (2) executor; or (3) custodian of securities or other property.

(C) "Non-testamentary trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as trustee or custodian of securities or other property in which the trusteeship or custodianship was not created by Last Will and Testament.

III.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acquiring control over or merging with any other commercial bank having one or more offices in Fayette County, Kentucky.

IV.

Defendant First Security is enjoined and restrained for five (5) years from the effective date of this Final Judgment from establishing any additional branch banking offices in Fayette County, Kentucky if, as a result of the establishment of such branch, defendant First Security would own or control more than one third of the total number of offices conducting a commercial banking business in Fayette County, Kentucky.

V.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acting as trustee or custodian of any non-testamentary trust account created subsequent to the effective date of this Final Judgment; provided, however, that nothing in this Final Judgment shall prevent defendant First Security from acting as trustee or custodian of any assets pursuant to an agreement executed at any time by any person (or spouse of any person) who is or at any time hereafter becomes an officer, director (including advisory directors) or employee of defendant First Security.

VI.

Defendant First Security may petition this Court at any time for [or ?] times after January 1, 1969 to modify this Final Judgment by striking Section V therefrom and any such petition shall be granted if defendant First Security shall

show to the satisfaction of this Court that in the year preceding the filing of such petition, it was acting as trustee, executor and/or custodian of either less than 25% by number, or less than 50% by dollar value of total assets (or both), of all trust accounts held by commercial banks in Fayette County, Kentucky. Plaintiff shall cooperate with defendant First Security in obtaining statistics showing the number and dollar value of trust accounts.

## VII.

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to First Security at its principal office, be permitted:

(1) Reasonable access, during office hours of First Security, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of First Security relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of First Security and without restraint or interference from it, to interview officers or employees of First Security, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, First Security, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such reasonable reports in writing to the Department of Justice

with respect to matters contained in this Final Judgment as may, from time to time, be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the executive branch of plaintiff except in the course of court proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII.

Jurisdiction is retained by this Court for the purpose stated in the Section VI of this Final Judgment and for the purposes of enabling any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the modification or termination of any provision thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

/s/ MAC SWINFORD
*United States District Judge*

Dated: December 29, 1967

## APPENDIX E

### Order

The motion to adjudicate the First National Bank and Trust Company of Lexington and the Security Trust Company as in violation of Section 2 of the Sherman Act and for the entry of a final judgment of divestiture is overruled. See opinion this day filed.

/s/. MAC SWINFORD
Mac Swinford, *Judge*

February 1, 1967

---

## APPENDIX F

### Opinion

SWINFORD, Chief Judge.

A detailed recitation of the history of this case is unnecessary and impertinent to an understanding of the decision on the matter now to be determined. In the interest of clarity of the conclusions reached, I must, however, preface this opinion with a brief summary of the steps which have brought the litigation to this stage.

The complaint in this action was filed on March 1, 1961 and alleged that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, was a violation of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. After a somewhat extended trial on the merits, this court on July 27, 1962 held that the merger was not in violation of either Section 1 or 2 of the Sherman Act and dismissed the complaint. The case was heard and the decision made by Honorable Hiram Church Ford, at that time Chief Judge of the Eastern District of Kentucky and presently serving as a Senior Judge in this district. See opinion, 208 F.Supp. 457.

On April 6, 1964 the Supreme Court reversed the judgment and held that the merger was in violation of Section 1 of the Sherman Act but did not determine the question posed by Section 2 of that Act. See opinion, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1.

On March 18, 1965 this court entered an order requiring divestiture of the properties belonging to the consolidated banking institution and ordered and directed the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Before the divestiture and related orders of the court were effected, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7. This Act became law on February 21, 1966 and provides in pertinent part as follows:

> "Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)."

The record is before the court on the following motion:

> "The United States of America, plaintiff herein, hereby moves the Court, on the record herein and on the grounds set forth in the attached affidavit of Lawrence F. Noble, for an adjudication that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company is in violation of section 2 of the Sherman Act (15 U.S.C. 2) and

for the entry of a final judgment of divestiture pursuant to that adjudication."

The motion is overruled for the following reasons.

Since the Supreme Court did not reverse the decision of this court on Section 2 of the Sherman Act, that ruling is the law of the case. The case was thoroughly and carefully tried and the issues determined by Judge Ford and so far as I am concerned that concludes the matter. For a judge of coordinate jurisdiction to reverse a judgment of a fellow judge who tried the case, saw and heard the witnesses testify and recorded his findings and conclusions, both of law and fact, in a lucid opinion, is to do disservice to the law and create disrespect for it. There must be an end to litigation and I can well understand why lay people would be thoroughly confused if a question of law at nine o'clock was decided by one judge and at ten o'clock the same question in the same case was decided to the contrary by another judge from the same bench. While there may be instances in which such a reversal would be justified, this is not one of them. Such a legal prerogative is questionable under any circumstance and I personally hold to the view that the law would be best served if reviews of decisions of trial judges were limited to appellate tribunals.

Notwithstanding my personal view of the matter, I recognize that a judge of coordinate jurisdiction does have the power to reexamine a prior decision of a fellow judge where there is a patent error. I find no such error in this record. A succinct statement of the law on this subject is found in the following quotation from the opinion in the case of In Re Carmona, D.C., 224 F.Supp. 497.

> "It is also expressed in the many cases which hold that 'judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other,' except in the most unusual circumstances. TCF Film Corp. v. Gourley, 240 F.2d

711 (3d Cir. 1957). See, United States v. Wheeler, 256 F.2d 745 (3 Cir.), cert. denied, 358 U.S. 873, 79 S.Ct. 111, 3 L.Ed.2d 103, rehearing denied, 358 U.S. 913, 79 S.Ct. 229, 3 L.Ed.2d 234 (1958), and Carnegie Nat. Bank v. City of Wolf Point, 110 F.2d 569 (9th Cir. 1940). A further expression of this concept is found in the rule that where a judge has decided the effect of a particular document or transaction, a judge of co-ordinate jurisdiction should not, even in an entirely separate case, decide that the same document is of a different effect. See e. g. United States v. Citizens National Trust and Savings Bank, 166 F.Supp. 410 (S.D. Cal. 1958), affirmed, 270 F.2d 128 (9th Cir. 1959).

"Finally, this important principle has given rise to another rule, which is directly applicable to the case at hand. That is the rule that where a judge has decided a question of law in one manner a judge of co-ordinate jurisdiction should not normally undertake to decide it another way. This rule, based upon judicial comity as well as good judicial administration, is of great universality. See e. g., In re Naturalization of Alacar, 196 F.Supp. 564, (D.Hawaii 1961); Rojas-Gutierrez v. Hoy, 161 F.Supp. 448 (S.D.Cal. 1958), affirmed, 267 F.2d 490 (9th Cir. 1959); Brusselback v. Cago Corp., 24 F.Supp. 524 (S.D.N.Y. 1938); and the multitude of federal and state court cases cited in 21 C.J.S. Courts § 196, note 94."

In the second place, it is my judgment that it was the intention of the Congress by the enactment of the Bank Merger Act to immunize this particular merger from all further attacks on the ground that it violated the law. I do not have the report of the House Committee on Banking and Currency before me, but the brief for the defendants quotes the following from the report and as so represented to the court I consider it authentic:

"Your Committee considered carefully what to do with the six banks against which the Department of Justice now has cases pending. The Attorney General strenuously opposed any legislation which might relieve these six banks from further prosecution under the antitrust laws. Other witnesses urged equally strongly that all six mergers should be relieved of any further liability under the antitrust laws. Three of these mergers were consummated and the antitrust suits instituted before June 17, 1963, when the Supreme Court for the first time (United States v. Philadelphia National Bank, 374 U.S. 321 [83 S.Ct. 1715, 10 L.Ed.2d 915]) held that bank mergers were subject to section 7 of the Clayton Act. These three cases were the Lexington, Ky., merger, the Manufacturers Hanover merger in New York City, and the Continental Illinois merger in Chicago. Three other mergers—in California, Tennessee, and St. Louis—were consummated after the Philadelphia decision and with knowledge of its possible effect on their situations.

"Under these conditions, your committee took the position that the first three mergers—the 'pre-Philadelphia' mergers—(of which defendant's was one) should be exempted from Section 7 of the Clayton Act and section 1 of the Sherman Act, like all other mergers consummated before the Philadelphia case. These three banks, acting in good faith, and their depositors and other customers and their communities should not be required to suffer the confusion, the disruption, and the losses which would result from efforts to unscramble them."

In the light of the whole history of this litigation and as the record now stands, it is my opinion that the merger of these two banking houses must be upheld.

An order in conformity with this opinion is this day entered.

February 1, 1967

## APPENDIX G

### Order

The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May 4, 1964, reversed the judgment of this Court and remanded this cause for proceedings in conformity with its opinion.

It is ORDERED, ADJUDGED AND DECREED as follows:

I

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

II

The directors of First Security National Bank and Trust Company who were directors of First National Bank and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

The United States Department of Justice shall have authority to examine and inspect all the records of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the bank as to the progress made in fulfilling the purpose of this order.

V

The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any

effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

March 18, 1965

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## APPENDIX H

### Order of Clarification of Order of Divestiture of March 18, 1965.

This cause coming on for hearing before the Court on petition of the defendant for clarification of an order of divestiture entered herein on March 18, 1965, and the plaintiff having filed its response thereto in which it concurred in the petition for clarification, and the Court, having heard arguments of counsel thereon and being advised, grants the petition for clarification and in accordance therewith it is ordered and adjudged as follows:

I

That Paragraph I of the order of March 18, 1965, be clarified so as to read as follows:

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former

Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to the limitations on the eligibility of stock to be voted as hereinafter set out to insure the independence of operation of the banks, all of the capital stock (except directors' qualifying shares) of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this Court to be distributed pro rata to those persons who are the shareholders of First National Bank and Trust Company of Lexington (formerly First Security National Bank and Trust Company of Lexington) at the time of said distribution.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

The limitations on the eligibility of stock to be voted are as follows:

(A) To assure the independence of operation of the banks, each bank shall for a period of ten (10) years provide plaintiff reasonable notice and an opportunity to apply to the Court for such orders as may be necessary concerning the manner in which the bank proposes to vote these shares of the other bank held in its trust department not treated, pursuant to the provisions of paragraph (B) hereof, as stock held by the beneficial owners. Each bank shall also take all such steps as may reasonably be required to secure the instructions of the beneficial owners of such shares concerning the manner in which such shares are to be voted.

(B) The by-laws of each of the banks shall contain limitations on the eligibility for voting, in any election of directors or plan of merger or consolidation, of those shares in excess of 1% of its outstanding shares which are owned or controlled, directly or indirectly, by any stockholder who owns or controls, directly or indirectly, more than 1% of the outstanding shares of the other bank. The by-laws shall further provide that shares held in the trust department of any bank or trust company in a fiduciary capacity shall be treated as owned or controlled only by the beneficial owner thereof when voted by a co-trustee not associated with the bank or trust company or where the bank or trust company has notified in writing the beneficiaries of the trusts requesting their instructions as to voting and has received written instructions from the beneficiaries concerning the manner in which such stock is to be voted and votes such stock in accordance with such instructions. The bank or trust company may, subject to the provisions of paragraph (A) hereof, exercise such voting power as has been given by the trust instrument if the beneficiaries shall fail to respond to the timely request of the bank or trust company for instructions as to voting, or if there is no living beneficiary competent to give such instructions.

II

Section III of the order of this Court of March 18, 1965, is hereby clarified as follows:

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National

Bank and Trust Company of Lexington. All of the foregoing acts shall be completed immediately after the banking association to be formed pursuant to Section I of the order of this Court of March 18, 1965, opens its doors for business.

/s/ MAC SWINFORD
*United States District Judge*

April 29, 1965

SUPREME COURT, U. S.

MAR 27 1968

JOHN F. DAVIS, CLERK

No. 1270

IN THE

# Supreme Court of the United States

October Term, 1967

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DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON,

*Appellees*

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**On Appeal From the United States District Court for the Eastern District of Kentucky**

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## JURISDICTIONAL STATEMENT

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IN THE

# Supreme Court of the United States

October Term, 1967

No.

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON,

*Appellees*

**On Appeal From the United States District Court for the Eastern District of Kentucky**

## JURISDICTIONAL STATEMENT

### OPINION BELOW

The opinion of the district court (App. B, *infra*, pp. 2a-8a) is unreported. A district court opinion of February 1, 1967, in this case (App. F, *infra*, pp. 15a-19a) was incorporated by reference in the opinion below; it is reported at 263 F. Supp. 268. This Court has written two previous opinions in this case; they are reported at 376 U.S. 665 and 382 U.S. 34.

## JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin the consolidation[1] of two commercial banks[2] of Lexington, Kentucky, on the ground that the consolidation would violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. § § 1, 2. See *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

The United States District Court for the Eastern District of Kentucky ("district court") on December 29, 1967, entered a judgment (captioned "Order") (App. A, *infra*, p. Ia) which permitted appellants, Dages I. Boyle[3] ("Boyle") and Central Bank & Trust Co. ("Central Bank") to intervene as "parties plaintiff", but denied the relief sought in their respective motions and intervening complaints, viz: that the district court:

(1) refuse to enter a proposed consent judgment tendered by appellees on August 7, 1967;

(2) reconsider and reverse a prior (July 27, 1962) holding that the consolidation did not violate Section 2 of the Sherman Act; and

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[1] This consolidation is frequently loosely referred to in the pleadings, orders, judgments and memoranda as a merger. Under general corporation law it would be a merger, but under the bank statutes cited herein it is a consolidation.

[2] First National Bank and Trust Company of Lexington ("First National") and Security Trust Company ("Security Trust") consolidated under the charter of First National, whose name was changed to First Security Bank and Trust Company of Lexington ("First Security").

[3] Boyle, a stockholder in each of the banks, intervened both individually and as representative of First National and Security Trust.

(3) enforce its final judgment entered on March 18, 1965 in accordance with the final judgment of this Court rendered April 6, 1964 (376 U.S. 665) holding that the consolidation violated Section 1 of the Sherman Act.

On the same day (December 29, 1967) the district court entered the consent judgment (App. D, *infra*, pp. 10a-14a).

Boyle appealed from both judgments, and filed his notice of appeal in the district court on January 16, 1968.

The jurisdiction of this Court rests on Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

## STATUTES INVOLVED

(1) Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

(2) Section 2 of the Bank Merger Act of 1966,[4] 80 Stat. 7, provides as follows:

> (a) Any merger, consolidation, acquisition of assets, or assumption of liabilities *involving an in-*

[4] Herein called "the Act" unless the context clearly indicates the contrary.

*sured bank* which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a *final judgment under the antitrust laws* prior to the enactment of this Act [Feb. 21, 1966], shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) [section 2 of Title 15]. (emphasis added).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities *involving an insured bank* which was consummated after June 16, 1963, and prior to the date of enactment of this Act [Feb. 21, 1966] and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act [Feb. 21, 1966] may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) [section 2 of Title 15]. (emphasis added).

(c) Any court having pending before it on or after the date of enactment of this Act [Feb. 21, 1966] any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an *insured bank* consummated after June 16, 1963,

shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act [subsec. (c) (5) of this section], as amended by this Act. (emphasis added).

## QUESTIONS PRESENTED

1. The primary question is whether the district court erred in:

(a) Refusing to enforce its final judgment of March 18, 1965[5] (requiring divestiture) and the final judgment of this Court rendered April 6, 1964,[6] solely because the district court concluded that the Act constitutionally vacated and nullified those judgments, and

(b) Entering on December 29, 1967, the so-called consent judgment tendered by appellees but not consented to by the intervening "parties plaintiff."

2. The answer to the above question turns on the answers to the following secondary and more specific questions:

A. Whether Congress usurped

(a) the exclusive power of the Judiciary to adjudicate (after a trial, hearing, or other proceeding meeting the requirements of due process of law) whether a statute has been violated by providing in Section 2(a) of the Act that it shall be "conclusively presumed" (adjudged) that certain transactions (including the consolidation of the

[5] When reference is made to this judgment it includes the order of clarification entered April 29, 1965.

[6] When reference is made to this judgment it includes the mandate filed in the district court May 4, 1964.

Lexington banks) did not violate any antitrust law other than Section 2 of the Sherman Act, and

(b) the exclusive power of the Judiciary to vacate final court judgments by providing in Section 2(a) of the Act that such presumption (adjudication) prevails over any unexecuted or partially executed "final judgment under the antitrust laws" holding contrary to such presumption, as do the aforesaid judgments of this Court and the district court.

B. Whether Section 2(a) of the Act, which vacates and nullifies the aforesaid judgments, violates the Due Process Clause of the Fifth Amendment by depriving the consolidated banks (First National and Security Trust), their stockholders and others of valuable *private rights vested under those judgments.*

C. Whether the Act violates the Due Process Clause of the Fifth Amendment because it arbitrarily and unreasonably grants discriminatory special benefits, such as (1) a conclusive presumption (adjudication) that antitrust laws *were not* violated, (2) a legislative vacation of "final" court judgments, (3) immunity from prosecution for violations of antitrust laws, and (4) special defenses for violating antitrust laws, to *all* the parties who participated in certain transactions "involving an insured bank", but *denies* any such benefits to any of the parties who participated in similar transactions in which an "insured bank" was not involved—even when all the parties to a transaction were non-insured banks.

D. Whether the district court had jurisdiction to enter the so-called consent judgment of December 29,

1967, in view of the fact that (1) no motion was filed in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) to vacate its final judgment of March 18, 1965, and no order or judgment was entered vacating that judgment of March 18, 1965, and (2) no judgment or order of this Court was entered vacating its final judgment, rendered April 6, 1964, and its mandate to the district court "for further proceedings in conformity with the opinion of this court."

E. Whether, even if the Act is constitutional, the district court nevertheless erred in entering the consent judgment on December 29, 1967, for the additional reason that the consent judgment does not adequately cure the harmful effects of the violation of Section 2 of the Sherman Act, and the district court was not obligated to enter and should not have entered any judgment which does not adequately protect the public.

## STATEMENT

The proposed consolidation was opposed by the Federal Reserve Board, the Federal Deposit Insurance Corporation and the United States, all of whom "concluded that the consolidation would adversely affect competition among commercial banks in Fayette County." (376 U.S. 665, 667).

First National and Security Trust agreed to consolidate under the charter of First National which was amended to change the name to First Security. First National and Security Trust did not lose their corporate existence. Under Title 12 U.S.C. § 215 and § 287.173 of the Kentucky Revised Statutes "the corporate existence" of each bank "continued" in the consolidated bank, First Security, which was "deemed to be the same corporation as each bank." Neither of

these banks lost their charter or corporate status because of the illegal merger.[7]

The district court stated in its opinion of December 29, 1967, that "the merger was consummated on March 1, 1961, ***." However, it appears that nothing occurred on that date other than the *hurried* execution of an agreement.

On that same day, March 1, 1961, the United States filed its complaint against First National and Security Trust alleging that it violated Sections 1 and 2 of the Sherman Act and requesting preliminary and permanent injunctions. On March 2, 1961, the United States filed a motion for a temporary order restraining the consolidation because of the practical problems which would be involved in a divestiture. On March 3, 1961, the United States amended its complaint and made First Security a party defendant and the three banks have remained and still are defendants in this action.

On March 6, 1961, the motion for the restraining order was denied by the district court *only* because representatives of the banks *assured* and *convinced* the court that they could and would keep separate records and operate the business of the consolidated banks in such a manner that divestiture would be feasible in the event such action should become necessary as a result of court decisions. Accordingly, the court entered an order on March 6, 1961 (App. I *infra,* pp. 26a-28a), which required First Security.

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[7] *In re Watkins' Estate,* 113 Vt. 126, 30 A. 2d 305 (Sup. Ct.), *cert. denied,* 319 U.S. 757 (1943); *Guardian Depositors Corp.* v. *Currie,* 292 Mich. 549, 291 N.W. 2 (Sup. Ct. 1940); *Commonwealth* v. *First Nat'l Bank & Trust Co.,* 303 Pa. 241, 154 Atl. 379 (Sup. Ct. 1931).

> keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, *capital stock, assets, liabilities and accounts can be equitably divided between the consolidated banks in accordance with their respective rights.*[8] (emphasis added).

Therefore, First National and Security Trust entered into and proceeded with this consolidation with full knowledge that it was opposed by responsible governmental agencies, and that the United States was of the opinion that it violated the Antitrust Laws and would attack it. Nevertheless, the banks persuaded the district court not to enter the restraining order and made it clear that they desired to assume all the risks involved in the illegal consolidation.

On July 27, 1962 the district court held that the consolidation did not violate either Section 1 or 2 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D.Ky.).

On April 6, 1964, this Court reversed the judgment of the district court and held (a) that the consolidation *violated* Section 1 of the Sherman Act and (b) that it was not necessary to decide whether it violated Section 2.

This Court's mandate requiring "further proceedings in conformity with the opinion of this court," was filed in the district court on May 4, 1964.

On July 2, 1964, the district court entered an order giving defendants until "September 1, 1964, to report

[8] This order sets out in great detail the manner in which the books and records were to be kept so that divestiture would be feasible.

to the court the progress made in complying with the judgment" of this Court. The time for making the report was, by a number of extensions, extended to February 16, 1965. On that date, First Security and the United States tendered a stipulation and proposed interlocutory decree with the representation that it would be another six months before the proposed plan of divestiture would be submitted.[9]

On Februuary 16, 1965, the district court also entered another order requiring *each of the three* banks "to show cause why this court should not appoint a special master to take over the books and records of the three banking institutions and to separate the businesses * * * and to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of the date of the merger, to-wit: March 1, 1961."

On March 2, 1965, First Security filed a response to the show cause order, eleven pages (26-37) thereof are devoted to showing that First Security had complied with the order of March 6, 1961, requiring records, accounts, and properties to be kept so that divestiture would be feasible. First Security, in connection with this response, filed the affidavit of its president showing that divestiture could reasonably be accomplished without a special master.

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[9] The facts before the district court disclosed (a) that all the parties to the action as well as the court had proceeded for several months upon the assumption that divestiture was required and (b) that the court was confronted with exasperating delays and procrastination. Apparently, the court believed that the report for which he had been waiting for several months would contain a proposed plan of divestiture and that the lack of such plan in the proposed decree showed that the parties had unreasonably delayed and procrastinated.

On March 18, 1965, the district court entered the aforesaid final judgment requiring divestiture (App. G, *infra,* pp. 20a-22a).

On April 14, 1965, First Security filed a petition for clarification of the March 18, 1965, final judgment. Twelve pages (7-19) of that petition emphasize again and again the importance of, and insist upon the fixing and protecting of, stockholders' rights (including their voting rights) and conserving the market value of their stock. To this end, the petition requested that specific detailed provisions be incorporated in the final judgment. The United States concurred in the petition and recommended adoption of the suggested provisions for the protection of the stockholders and fixing of their rights and valuable rights of First Security and First National. Thus, the United States and the defendant banks took cognizance of and insisted upon the fixing and vesting of valuable private rights, particularly of the stockholders and the two banks which would re-emerge by virtue of the divestiture as separate corporate entities. They were successful in their efforts—such rights were fixed—and the order of clarification was granted (App. H, *infra,* pp. 22a-25a).

The final judgment, as clarified on April 29, 1965, fixed and established, among other things, the following rights:

(a) A divestiture must be executed *"without delay,"*

(b) First National and Security Trust would be reestablished with separate assets, capital stock, deposits, loans, officers, directors, etc.,

(c) The name of the consolidated bank (First Security) would revert to First National, and First Na-

tional would *continue* as a separate corporate entity under its original charter but having *only* such assets and properties as remained after Security Trust was fully restored "as a separate competitive and independent commercial bank equivalent to the former Security Trust Company,"

(d) Stockholders would own stock in each of the respective banks and enjoy rights in respect thereto which were specified in detail and fixed, adjudicated and vested by the final judgment of March 18, 1965,[10]

(e) A trustee would hold all shares of the capital stock of the restored Security Trust for a period of time for the benefit of the stockholders during which time substantial voting rights and other rights and powers were vested in the trustee all as set forth in the final judgment, for the announced purpose of assuring independent management of the two banks.

The plan of divestiture was thus completed and both *private* and *public* rights were *interblended,* fixed and determined. All that remained to be done was the execution and supervision essential to carry out the final judgment of March 18, 1965. No appeal was taken from the district court's final judgment of March 18, 1965.

However, that judgment was not executed because the banks continued their policy of delay and procrastination until enactment of the Act (February 21, 1966). If the district court had received reasonable cooperation from the banks the dissolution, division, or distribution of assets mentioned in Section 2(a) of the Act would have occurred long before February 21, 1966, the date the Act was enacted.

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[10] All that stockholders had for their original investments were these judgment rights.

The United States, on April 28, 1966, laboring under the mistaken view that the Bank Merger Act nullified the final judgment of this Court and the final judgment of the district court, moved the district court to reconsider and reverse its prior holding that the consolidation did not violate Section 2 of the Sherman Act, and in a memorandum filed in support thereof stated:

> We concede that the statute (Bank Merger Act of 1966) is applicable to the *merger of the defendants.* It therefore creates a *conclusive presumption* that the merger *did not violate* Section 1 of the Sherman Act, and removes *the legal support for the presently outstanding order of divestiture, which is based upon that Section.* (emphasis added).

On February 1, 1967, the district court overruled this motion, and the United States filed a notice of appeal from this order. Thereafter, on August 7, 1967, the United States and the defendant banks tendered the so-called consent judgment for entry unless the United States withdrew its consent within thirty days (later extended to forty days). The United States agreed to dismiss its appeal to this Court if the consent judgment was entered. At this juncture Boyle and Central Bank filed their respective motions to intervene and their intervening complaints.

The United States in sponsoring the so-called consent judgment, *completely abandoned* its prior and *successful* contention to the district court that divestiture is the *only* adequate remedy when the restraint of trade constituting a violation of the Sherman Act is caused by eliminating competition between consolidating corporations, and contended that the insignificant

restrictions in the so-called consent judgment were sufficient to cure the harmful effects of a monopoly (Section 2 violation).

On December 29, 1967, the district court entered the so-called consent judgment which stated: "Now, therefore, *upon the consent of the parties hereto,* it is hereby ordered, adjudged, and decreed as follows." (App. D *infra,* p. 11a). However, as previously stated the intervening "parties plaintiff" did not consent to this judgment.

The district court's reason for not holding the Act unconstitutional is disclosed by the following language in the December 29, 1967 opinion (App. B, *infra,* pp. 7a-8a):

> The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. The *litigation was not final,* notwithstanding the fact that an order directing divestiture had been entered, as the order itself *retained* the case on the docket for the purpose of *guiding* and *determining whether or not any action on the part of the defendants contravened the directive of the order.* Nothing had been done toward carrying out the orders of the court and no report of progress had been made of record. To deny the Congress the right to enact legislation finally settling *a question of fact* that was still open and subject to further orders of the court, would invite a *criticism* of ignoring the separation of powers assured by the Constitution to a much greater extent than is urged here by the intervenors in the criticism of the Congressional enactment involved. (emphasis added).

Clearly, the Act was held constitutional only because the district court thought (a) that retention of the case on the docket prevented the final judgment entered on March 18, 1965, from being a final judgment

which could not be vacated by Congress, and (b) that the question whether a statute has been violated is a "question of fact" which Congress could determine.

The concluding paragraph of the March 18, 1965 order which retained the case on the docket reads (App. G, *infra*, p. 22a):

> Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Significantly, the concluding paragraph of the December 29, 1967, so-called consent judgment (captioned "final judgment") reads (App. D, *infra*, p. 14a):

> Jurisdiction is retained by this Court for the purpose stated in the Section VI of this *Final Judgment* and for the purposes of enabling any party to this *Final Judgment to apply to this Court* at any time for such further orders and directions as may be necessary or appropriate for the construction or carying out of this Final Judgment the modification or termination of any provision thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof. (emphasis added).

The term "final judgment" is employed twenty times in the so-called consent judgment and the stipulation filed therewith to describe that judgment. Yet, it is retained on the docket as was the final judgment of March 18, 1965.

## THE QUESTIONS ARE SUBSTANTIAL

Each of the foregoing questions are raised by specific averments in Boyle's intervening complaint (App. J, *infra,* pp. 29a-31a) and his motions. Each question is a substantial question sufficient to reverse the judgments of the district court appealed from herein.

### Violation of Principle of Separation of Powers

Surely a substantial question is presented when this Court squarely held in a final judgment that the consolidation violated Section 1 of the Sherman Act and Congress 22 months later conclusively presumed (adjudicated) that the consolidation did not violate that section and that the final judgment of this Court and the final judgment of the district court be vacated.

This question is of great national concern because, if the final judgment of this Court and the final judgment of the district court can be vacated by this Act and if Congress can "conclusively" presume that Section 1 of the Sherman Act and other antitrust laws were not violated by certain transactions, then Congress can (a) vacate any federal court judgment and (b) "conclusively" adjudicate whether any federal statute has been violated.

The opinion of the district court will set a dangerous and incorrect precedent of tremendous national importance unless this Court reverses it.

There can be no possible doubt that Section 2(a) of the Act purports to strike down "a final judgment under the antitrust laws" which has *not* been fully executed. Under the authorities herein cited Section

2(a) of the Act violates the principle of separation of powers and is unconstitutional.

If Congress changes a statute *before* the time for appeal or re-hearing of a judgment has expired or while such judgment is pending on appeal or re-hearing, the new statute may affect the judgment, if it is otherwise valid. See *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Western Union Tel. Co.* v. *Louisville & Nashville R.R.*, 258 U.S. 13 (1922).

However, the law is well settled that Congress has no power to open or vacate final judgments. 1 Black, *Judgments*, § 298, at pp. 371-74 (1891); 1 Cooley, *Constitutional Limitations* 190 (8th ed); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967) ("No one, except this Court, has authority to alter or modify our mandate."); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948); *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961); *United States* v. *O'Grady's Executors*, 89 U.S. (22 Wall.) 641 (1875); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (cites three circuit court decisions, each holding that a decision of a federal court cannot be vacated, modified or altered by the legislature); *Schoen* v. *Mountain Producers Corp.*, 179 F.2d 707, 713 (3d Cir.), *cert. denied*, 336 U.S. 937 (1949) ("to apply the subsequently enacted provisions of Section 1406 (a) would involve the retroactive annulment of a judgment validly entered by the district court. This the statute did not and could not do.") *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 261-62 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *Hosier* v. *Aderhold*, 71 F.2d 422 (5th Cir. 1934); *United*

*States ex rel. Nerbonne* v. *Hill*, 70 F.2d 1006, 1007 (3d Cir.), *cert. denied*, 291 U.S. 658, 292 U.S. 634 (1934): ("[t]he law seems to be well settled that a repeal, after final judgment, will neither vacate the judgment nor arrest the execution of a sentence partly executed under the judgment"); *United States ex rel. Behen* v. *Ruppal*, 6 F. Supp. 346, 347 (S.D. Ill. 1934) ("[t]he general rule with reference to a final judgment in both civil and criminal cases seems to be that no act of a legislative body can affect a valid subsisting judgment").

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp., supra*, this Court said:

> Judgments within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by *another Department of Government.* (333 U.S. at 113) (emphasis added).

Again, in *United States* v. *O'Grady's Executors, supra*, the Supreme Court said:

> Judicial jurisdiction implies the power to hear and determine a cause and, inasmuch as *the Constitution does not contemplate that there shall be more than one Supreme Court*, it is quite clear that *Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the Government.* (89 U.S. (22 Wall.) at 647-648) (emphasis added).

In *Battaglia* v. *General Motors Corp., supra*, the court upheld the constitutionality of the Portal-to-Portal Act because "[i]t left valid final judgments for portal-to-portal pay." (169 F.2d at 262).

In *Western Union Tel. Co.* v. *Louisville & Nashville R.R.*, 258 U.S. 13 (1922), a state court judgment had ordered condemnation of the railroad's right of way, and while the judgment was *pending on appeal* the legislature passed an act protecting railroads from condemnation of rights of way. This Court gave effect to the statute because the judgment was still pending on appeal but made clear that no effect would have been given to the statute if the judgment had been final.

The foregoing authorities establish that the provisions of Section 2(a) of the Act which attempt to strike down a "'final judgment under the antitrust laws'' are unconstitutional, irrespective of whether the March 18, 1965, judgment of the district court or the April 6 judgment of this Court are final judgments.[11]

The judgment rendered by this Court April 6, 1964, and the judgment of the district court entered March 18, 1965, are final judgments because they decided all the issues involved "on the merits" and the fact that supervisory, ministerial and executory acts remained to be done did not destroy their finality. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *St. Louis, Iron Mountain & Southern Ry.* v. *Southern Express Co.*, 108 U.S. 24, (1883); *Bronson* v. *La Crosse & Milwaukee* R.R., 67 U.S. (1 Black) 524 (1863); *In re Casaudoumecq*, 46 F. Supp. 718 (S.D. Calif. 1942); 50 C. J. S. *Judgments* § 620, at p. 43-44 (1947).

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[11] If those judgments are still in full force and not affected by the Act, there is no necessity to determine the other constitutional questions raised herein. Otherwise, it is necessary to determine some or all of the other constitutional questions.

The court in *In re Casaudoumecq, supra,* reviewed prior cases and summed the law up as follows:

> A decree is none the less final because some future orders of the court may become necessary to carry it into effect. If the judgment disposes of the merits of the particular matter before the court and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not interfere with its finality. (46 F. Supp. at 723).

Clearly under the foregoing cases the judgment of this Court (376 U.S. 665) was final when the time for filing a petition for a rehearing expired. No one, including Congress, could thereafter decide or adjudicate that the consolidations did not violate the Sherman Act. All that remained to be done was for the district court to carry out the mandate of this Court in accordance with the guidelines set forth in other decisions of this Court. See *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 186 (1944); *United States* v. *du Pont & Co.,* 366 U.S. 316, 322-23 (1961). The only question with regard to this case which could conceivably come before this Court in the future was whether its final judgment was being properly executed. As stated in the *Brown Shoe* case, the questions already decided by this Court were "thereafter foreclosed." The judgment of this Court became *res judicata.*

Likewise, when the time for appeal from the March 18, 1965, judgment of the district court expired that judgment became final and *res judicata.* See *The General Pinkney,* 9 U.S. (5 Cranch) 281 (1809); *Jenckes* v. *Mercantile Nat'l Bank,* 407 S.W. 2d 260, 263-65 (Tex. Civ. App. 1966); 50 C. J. S. *Judgments* § 620 at 43-44 (1947). There was no longer any avenue

of approach to this Court to question the wisdom or adequacy of that judgment. Surely, the deliberate attempt of Congress to undo it and the judgment of this Court must fail or the power of the courts and confidence in court judgments will be seriously shaken.

The district court in support of its conclusion (1) that "the litigation is not final" and (2) that Congress had "the right to enact legislation finally settling a question of fact that was still open and subject to further orders of the court" cited *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940). Neither of those cases support that conclusion.

In the *Wheeling Bridge* case this Court held that the bridge obstructed free navigation *in violation of the statutes* and ordered that the bridge be removed or elevated and *enjoined "defendants against any reconstruction or continuance."* Consequently, the injunction was one that continued indefinitely in the future.

Before the judgment was carried out, the bridge was, by an act of Congress, made a post road for the passage of the mails, and its owners were authorized "to have and *maintain* it at its present site and elevation."

Subsequent to the enactment of the new act, the bridge was practically destroyed by a windstorm and the owners were *in the process of rebuilding* it when the plaintiff (the State of Pennsylvania) applied for an injunction to *enjoin construction* and *enforce the decree. The injunction was granted because the owners did not appear.* The owners thereafter moved to dissolve the injunction. This Court (1) which had original jurisdiction required the plaintiff to pay the

costs awarded in the judgment because those rights were "private rights" *vested* by the judgment, and (2) dissolved the injunction in its discretion because (a) the injunction had been granted to prevent obstruction of free navigation in violation of the then existing law which was changed by the new legislation making the construction and maintenance of the bridge permissible *in the future,* and (b) it would be a vain and useless act to require enforcement of the injunction when the new statutes made reconstruction and maintenance of the bridge lawful in the future.

Section 2(a) of the Act adjudicated that Section 1 of the Sherman Act had not been violated even in those cases where the courts had held that Section 1 had been violated. Clearly, Congress intended to strike down the judgment of this Court (376 U.S. 665) because it is and was the only known judgment in existence which could have come within the term "a final judgment under the antitrust laws" used in Section 2(a). In the case at bar, if the divestiture had been carried out, the banks could not now consolidate in violation of Section 1 of the Sherman Act. The enforcement of the final judgment of this Court and the final judgment of the district court would not be a useless act today any more than it would have been the day of the aforesaid judgments became final.

The *Paramino Lumber* case cited by the district court did not even involve a court judgment and is distinguished in the Jurisdictional Statement of Central Bank and will not be further discussed herein.

The act is also unconstitutional because it adjudicates that various transactions (acquisition of assets and assumption of liabilities) which "involve an insured

bank" did not violate Section 1 of the Sherman Act and certain other antitrust laws. This is a usurpation of an exclusive judicial function to determine after a trial or hearing upon adequate notice to interested parties, production of evidence, cross-examination, etc., whether a statute has been violated. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 296 (1936), and *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

**Deprivation of Private Rights Vested Under Final Judgment**

Section 2(a) of the Act is unconstitutional because by vacating and nullifying final judgments under the antitrust laws it impairs and destroys in violation of the Due Process Clause of the Fifth Amendment, valuable private rights vested by those judgments.

Boyle, by intervening individually and as a representative of First National and Security Trust, is seeking to protect rights vested by the March 18, 1965, final judgment. He has intervened not "to bring in digressive issues, nor to impeach the existing decree. [His intervention] is a vindication of the decree." *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, 508 (1941).

That judgment required the re-creation of Security Trust in such a manner as to make it "the equivalent of the former Security Trust Company at the time of its consolidation" with First National (App. G, *infra*, p. 20a), and what remained of the consolidated bank would be the equivalent of the former First National. Therefore, that judgment vested in both First National and Security Trust the right to be recreated and in Boyle the right to hold stock in the recreated banks, as he had prior to their consolidation.

The destruction of these rights, and other vested private rights already mentioned herein, by the Act of 1966 amounts to the taking of property without due process of law in violation of the Fifth Amendment. This Court has defined a constitutionally vested right as ' "an immediate fixed right of present or future enjoyment,' " and ' "an immediate right of present enjoyment, or a present fixed right of future enjoyment.' " *Pearsall* v. *Great Northern Ry.*, 161 U.S. 646, 673 (1896). The right of the banks to existence became an "immediate fixed right" at the time the lower court's divestiture decree became final.

This Court has repeatedly stated that the private and personal rights which become vested in a final judgment are protected by the Constitution. *E.g., Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922); *Truax* v. *Corrigan*, 257 U.S. 312 (1921); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870); *McCullough* v. *Virginia*, 172 U.S. 102 (1898) *Memphis* v. *United States*, 97 U.S. 293 (1877); *City of Paris* v. *Kentucky Util. Co.*, 280 Ky. 492, 133 S.W. 2d 559, 562 (Ct. App. 1939); *Jenckes* v. *Mercantile Nat'l Bank*, 407 S.W. 2d 260 (Tex. Civ. App. 1966); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).[12]

It is well established that private rights which are interblended or incidental to public rights are entitled to protection under the Due Process Clause. *Missouri-Kansas Pipeline Co.* v. *United States* 312 U.S. 502,

[12] The *Wheeling Bridge* case fully supports Boyle's position and is strongly relied upon by him. That case recognizes the general rule that Congress cannot vacate a final judgment, and cannot destroy private rights vested under a final judgment.

509 (1941); *Auto Workers* v. *Scofield* 382 U.S. 205 (1965); *Hodges* v. *Snyder,* 261 U.S. 600 (1923). *United States* v. *United States Gypsum Co.,* 124 F. Supp. 573, 579 (D.D.C. 1954), rev'd on other grounds, 352 U.S. 457 (1957).

In the *United States Gypsum* case, *supra,* the court said:

> Often, in this readjusting process, a decree provides not only for duties but also for rights *inter se* the parties. Where such rights are given, *they carry to the recipient party the right to urge compliance, within the limits of the decree.* (124 F. Supp. at 579 (emphasis added).

In *Missouri-Kansas Pipeline case,* supra., the Court said:

> We recognize the duty of expeditious enforcement of the anti-trust laws. But expedition cannot be had at the sacrifice of rights *which the original decree itself established.* (312 U.S. at 509) (emphasis added).

Section 2(a) of the Bank Merger Act takes away rights of First National, Security Trust and Boyle—rights vested by the final decree of divestiture entered by the lower court. Therefore, to the extent that the Bank Merger Act takes away those rights it must be declared unconstitutional, and the court's final judgment of divestiture must be enforced.

**Arbitrary Discrimination**

The Act is unconstitutional in that it arbitrarily and unreasonably discriminates (a) between insured banks, (b) between uninsured and non-insured banks, and (c) between insured banks and other persons subject generally to the antitrust laws. Such patent discrimina-

tion is conclusively shown by the following *hypothetical* examples of the treatment of certain transactions under the Act:

1. *Discrimination Between Insured Banks.* On January 1, 1966 two *insured banks* located in Nashville, Tennessee consolidated and on the same day two insured banks in Memphis, Tennessee consolidated. It is stipulated that both consolidations violated Section 1 of the Sherman Act. The United States prepared a separate complaint attacking each consolidation as being in violation of Section 1. The action attacking the Nashville consolidation was "initiated" by filing the complaint in the district court on February 19, 1966. The United States intended to file the complaint attacking the Memphis consolidation on February 22, 1966. Under Section 2(b) of the Act, the Nashville action may be prosecuted to judgment (with a "new" substantive rule of law to be applied) and a divestiture may be properly ordered. However, the consolidation of the Memphis banks cannot be attacked simply because it is a "consolidation . . . as to which no litigation was initiated by the Attorney General" prior to February 21, 1966. Consequently, entirely different treatment is retrospectively accorded the two consolidations, and no reasonable basis exists which would justify such gross discrimination between the treatment of two practically identical fact situations. Surely this is unconstitutional discrimination.

2. *Discrimination Between Insured and Non-Insured Banks.* On May 1, 1963, two non-insured banks located in San Francisco, California, consolidated and on that same date two insured banks located in Los Angeles, California consolidated. Both consolidations clearly violate Section 1 of the Sherman Act. As of

this very moment the United States may file a complaint under Section 1 of the Sherman Act attacking the consolidation of the non-insured banks and proceed to judgment, but under Section 2(a) of the Act, the merger of the insured banks is "conclusively presumed to have not been in violation of" Section 1 of the Sherman Act.[13]

3. *Other Examples of Discrimination:* a. On June 16, 1963, a transaction (merger, acquisition of assets, etc.) involving an insured bank was consummated. A similar transaction involving an insured bank was consummated on June 17, 1963. Under Section 2(a) of the Act, the first transaction is "conclusively presumed" not to have been in violation of Section 1 of the Sherman Act, but no such presumption arises as to the second transaction.

b. Prior to June 17, 1963, a non-banking corporation participated in an "acquisition of assets" in which an "insured bank" was involved. That transaction is "conclusively presumed" not to have been in violation of Section 1 of the Sherman Act. If, however, an identical transaction involving an "insured bank" occurred on or after June 17, 1963, no such presumption arises.

c. The procedural provisions of the Bank Merger Act of 1966 create a *new defense* to the antitrust laws. *United States* v. *First City Nat'l Bank,* 386 U.S. 361

[13] There is no reasonable basis whatsoever for this discrimination against non-insured banks because insurance of bank deposits has no bearing on whether a consolidation or other combination results in a monopoly or undue restraint of trade. If anything, insurance of bank deposits adds to the financial strength of a bank to restrain trade or monopolize and should be a factor tending to require enforcement of the antitrust laws rather than special favors and exemption from enforcement.

(1967). Such new defense is available solely to *insured banks*—no one else. All non-insured banks and all other corporations of a financial nature or otherwise are discriminated against by not having this special defense to the antitrust laws.

Further examples of how Section 2 of the Act discriminates arbitrarily and unreasonably between banks and between banks and other corporations could be given.

The foregoing analysis demonstrates beyond any question the unconstitutional discrimination in violation of the Due Process Clause of the Fifth Amendment which is inherent in the Act. The reasoning of this Court in *Schneider* v. *Rusk*, 377 U.S. 163 (1964) is indistinguishable in its application to this case. In the *Schneider* case a naturalized citizen (German by birth) challenged the constitutionality of an act depriving a naturalized citizen (but not a native born citizen) of his American citizenship for residing continuously for three years in the foreign state of which he was formerly a national. In holding such act unconstitutional because of its discriminatory treatment of native born and naturalized citizens, this Court stated that: "... the Fifth Amendment, [forbids] discrimination that is 'so unjustifiable . . . as to be violative of due process.' " (377 U.S. at 168). As there, so here—the Act is *"unjustifiable"* as to the different treatment of banks. See also, *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

**District Court Had No Jurisdiction To Enter Consent Judgment**

The sole jurisdiction of the district court was to proceed in accordance with the final judgment of this Court. *Pike Rapids Power Co.* v. *M., St. P. & S.S.M.*

*Ry.*, 106 F.2d 891 (8th Cir. 1939); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). No one could re-open, modify or vacate the final judgment of this Court except this Court. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra; Rogers* v. *Consolidated Rock Prods. Co.*, 114 F.2d 108 (9th Cir. 1940). In the *El Paso* case, this Court stated: "No one, except this Court, has authority to alter or modify our mandate." (386 U.S. at 136).

Even if the district court had power to vacate its own judgment of March 18, 1965, it should nevertheless exercise such power only in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) which were not followed.

The record is clear that no motion was filed in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) to vacate the final judgment of the district court entered March 18, 1965 and no judgment or order was ever entered by this Court vacating its final judgment rendered April 6, 1964. Therefore, the so-called consent judgment is a complete nullity.

**Even If the Court Had Jurisdiction To Enter the Consent Judgment, the Court Should Not Have Entered It**

The facts and law showing that the district court should not have entered the so-called consent judgment for the additional reason that it does not cure the harmful effects of a monopoly (violation of section 2 of the Sherman Act) are fully discussed in the Jurisdictional Statement filed by Central Bank, and to avoid unnecessary duplication, that portion of that statement is incorporated herein by reference and will not be further discussed, except to emphasize that Boyle in his pleadings relied on this point and still relies upon it and concurs in the statements made by Central Bank.

## CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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March 1968

# APPENDIX

# APPENDIX A

Dec 29 1967

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, KENTUCKY, *Defendants*

## Order

The motions of Central Bank and Trust Company and Dages I. Boyle for leave to intervene as parties plaintiff in order to file certain motions allegedly affecting them is sustained and the motions filed on September 15, 1967 are made a part of the record for the court's consideration and ruling.

The motions that the court not accept the proposed final judgment are overruled.

The motion to reconsider the court's decision of February 1, 1967 is overruled.

The plaintiff-intervenors' complaints, tendered on September 15, 1967 are ordered filed as of that date and the prayers of the complaints and each of them are denied.

See Opinion.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

Dec 29 1967

## APPENDIX B

### Opinion

This case has had a long and tortuous career. The record is now before the court on a stipulation between the plaintiff and defendants to enter a proposed final judgment which is tendered with the stipulation. Both the stipulation and the proposed final judgment are made a part of this opinion as appendages.

To give a detailed and comprehensive history of this case would add nothing to an understanding of the conclusions the court reaches here and would be but boring both to the litigants and their counsel who have been over these facts so many times. It is necessary, however, in order to properly establish the basis of the motions now before the court to give very briefly the steps by which the case has come to this point.

Lexington, Kentucky is a relatively small city. It is the center and heart of a rich agricultural section known as the Bluegrass region of Kentucky. Formerly there was relatively little industry in the locality and the principal business in Lexington and its environs was agriculture. While agriculture is still most likely the principal business of the region, many industrial plants have moved into Lexington and the surrounding county seat towns and have become a major source of the economic life of the locality. The First National Bank and Trust Company of Lexington and the Security Trust Company prompted by an idea, so they say, that big business requires big financing, arranged between themselves to merge their banking operations into one large commercial bank and trust company to be known as the First Security National Bank and Trust Company of Lexington. All preliminary steps were taken and the proposed merger was approved by the Comptroller of the Currency of the United States. The merger was consummated on March 1, 1961 and later

on the same day the United States filed its complaint against the two independent banking institutions, pursuant to Section 4 of the Sherman Act, seeking to enjoin alleged violations of Sections 1 and 2 of that Act. 15 U.S.C.A. 1, 2. By an amended complaint, filed on March 3, 1961, the First Security National Bank and Trust Company of Lexington was joined as a party to the action.

A trial was held in this court, at which the parties and all competitors were given an opportunity to be heard in opposition to the merger. The court was of the opinion that there was no violation of either Section 1 or Section 2 of the Sherman Act, but as a precautionary measure required, by order, that the defendants agree to keep separate their respective business transactions until the time for an appeal had expired, or, in the event of an appeal, until the case had been finally determined. The opinion of the trial court is found in the case of U. S. v. First National Bank & Trust Co. of Lexington, 208 F.Supp. 457.

The United States prosecuted an appeal and on April 6, 1964, the Supreme Court reversed the judgment of this court and held that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, violated Section 1 of the Sherman Act. It declined to review the question posed by the complaint under Section 2 of the Sherman Act and remanded the case to this court for further proceedings in conformity with its opinion. U. S. v. First National Bank & Trust Co. of Lexington, et al, 376 U. S. 665.

No steps were taken to effect a separation of the banking business of the First National Bank and Trust Company of Lexington and the Security Trust Company, being operated as the First Security National Bank and Trust Company of Lexington. This court was of the opinion that the defendants were ignoring the decision of the Supreme Court and deliberately delaying a compliance with its mandate and thereupon entered an order holding the

banks in contempt. An appeal was taken from this order and it was reversed by the Supreme Court on the ground that no order of divestiture had been entered and that therefore the defendants were not in contempt of any order of the court.

On March 18, 1965, this court entered a divestiture order which required the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Subsequently, on April 29, 1965, an order was entered clarifying in minor respects the order of March 18, 1965.

Before the divestiture, directed by these orders, was accomplished, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7, designated as the Bank Merger Act of 1966. Section 2 (a) of this Act provides as follows:

> "Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act (Feb. 21, 1966), shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) (section 2 of Title 15)."

After this statutory enactment there is no indication from the record that the defendants made any effort to comply with the orders of the court with respect to the matter of divestiture.

On April 28, 1966 the United States moved the court for an adjudication that the merger of the defendants

violated Section 2 of the Sherman Act because the Bank Merger Act does not apply to banks which are in violation of Section 2 of the Sherman Act. By order of February 1, 1967, the motion was overruled for reasons set forth in a written opinion. U. S. v. First National Bank & Trust Co., et al, 263 F. Supp. 268.

On March 30, 1967, the plaintiff filed a notice of appeal to the Supreme Court from the order of this court of February 1, 1967. So far as the court is advised no further steps were taken to prosecute the appeal and on August 7, 1967, the plaintiff and defendants filed the stipulation in this court consenting to the entry of a final judgment. See appendix.

On September 15, 1967 the Central Bank and Trust Company, a commercial banking institution of Lexington, Kentucky, filed a motion "for leave to intervene as a party plaintiff in order: (1) to move that the Court not accept the proposed Final Judgment prior to hearing Central Bank's motions to intervene and for other relief; (2) to move that the proposed Final Judgment not be accepted by this Court; and (3) to move that this Court reconsider its decision of February 1, 1967, upholding the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company resulting in the establishment of First Security National Bank and Trust Company of Lexington; and (4) to permit it to file the intervening Complaint attached hereto."

On the same date Dages I. Boyle, individually and as a representative of the First National Bank and Trust Company of Lexington and the Security Trust Company, filed his motion to intervene as a party plaintiff in order to oppose the entry of the final judgment. Dages I. Boyle is a citizen and resident of Fayette County, Kentucky, a stockholder in the defendant Security Trust Company and a stockholder in the First Security National Bank and Trust Company of Lexington.

Both the plaintiff and the defendants vigorously oppose the right of these two intervenors to be permitted to intervene and be heard on the question of the propriety of the entry of the stipulation and final judgment.

The court is of the opinion that both the petitioners should be permitted to intervene and thereby permitted to be heard in opposition to the proposed final judgment. I rest my decision on the case of Cascade Natural Gas v. El Paso Natural Gas, 386 U. S. 129, which I believe to be directly in point. If the Court by its decision in Cascade grants intervention of right to any volunteer claiming to speak for the public interest when he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit, these intervenors are well within the class entitled to intervene. The interpretation of the opinion is that made by a member of the Court who sat in the case. See dissenting opinion of Mr. Justice Stewart.

Equal justice under law means that any court action, whether civil or criminal, should be a satisfying experience to each litigant; not that each litigant would be satisfied with the results, but satisfied that his rights have been thoroughly and objectively considered. I do not mean to imply that the United States has not conscientiously represented the public interest, but I do seriously question its judgment in not permitting this case to go to a final decision by the Supreme Court. The plaintiff here had consistently taken the position that the action of these two banking institutions was unlawful and contrary to the public interest of the Lexington community. It was eventually sustained in this position by the Supreme Court. When the Congress sought to legislate the question by the enactment of the statute referred to, the United States again vigorously challenged the sufficiency of the statute to cover the issues presented by the record in this court. Its position was overruled and it proceeded

to take an appeal. Suddenly, and I may assume without warning to anyone, the plaintiff makes about a ninety percent capitulation and now becomes the advocate of the merger.

I do not question the right of the United States or any other public agency to compromise litigation in which it is involved, but I do believe that the United States should go very slowly in cases of this character where the whole community, comparatively small though it may be, is deeply concerned and especially where the Supreme Court in reversing the lower court said:

> ". . . we think it clear that significant competition will be eliminated by the consolidation. . . . ; that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.
>
> "We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade. . . ."

Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind. American justice is so constituted that not only should it be fair and impartial but the litigants and the public should know that it is fair and impartial.

I may assume that the decision of this court will be reviewed by a higher court and in order to give such reviewing court a ruling on all questions presented, with a hope of bringing the litigation to a conclusion within a reasonable time, I will proceed to rule upon each of the questions raised by the intervenors:

(1) The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. The litigation was not

final, notwithstanding the fact that an order directing divestiture had been entered, as the order itself retained the case on the docket for the purpose of guiding and determining whether or not any action on the part of the defendants contravened the directive of the order. Nothing had been done toward carrying out the orders of the court and no report of progress had been made of record. To deny the Congress the right to enact legislation finally settling a question of fact that was still open and subject to further orders of the court, would invite a criticism of ignoring the separation of powers assured by the Constitution to a much greater extent than is urged here by the intervenors in the criticism of the Congressional enactment involved. Paramino Co. v. Marshall, 309 U. S. 370. I believe the question is settled in the case of State of Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U. S. 421.

(2) The court declines to reconsider its ruling sustaining the merger on Section 2 of the Sherman Act for the reasons set forth in its opinion in U. S. v. First National Bank & Trust Company of Lexington, et al., 263 F. Supp. 268.

(3) There has been no showing of bad faith on the part of the United States and the final judgment submitted with the stipulation of August 7, 1967 should be entered and it is this day signed by the court.

An order in conformity with this opinion is this day entered.

Dec 29 1967

/s/ Mac Swinford
Mac Swinford, *Judge*

## APPENDIX C

### Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, that paragraphs (1) and (2) of the stiplation filed on August 7, 1967, are amended as follows:

(1) The parties consent that a Final Judgment in the form attached may be filed and entered by the Court at any time after the expiration of forty (40) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of forty (40) days by serving notice thereto upon the other parties hereto and filing said notice with the Court.

Dated: September 1, 1967

For The Plaintiff:

/s/ EDWIN M. ZIMMERMAN
Edwin M. Zimmerman
*Acting Assistant*
*Attorney General*

/s/ WILLIAM H. MCMANUS
William H. McManus
*Attorney,*
*Department of Justice*

/s/ W. D. KILGORE, JR.
William D. Kilgore, Jr.

/s/ CHARLES L. WHITTINGHILL
Charles L. Whittinghill
*Attorneys,*
*Department of Justice*

Filed: September 5, 1967

For The Defendants:

ARNOLD & PORTER BY
/s/ VICTOR H. KRAMER
Victor H. Kramer

## APPENDIX D

### Final Judgment

Plaintiff, United States of America, having filed its complaint herein on March 1, 1961, pursuant to Section 4 of the Sherman Act seeking to enjoin alleged violations of Sections 1 and 2 of the Sherman Act, and defendant First Security National Bank and Trust Company of Lexington, having appeared and filed its answer to such complaint, denying the substantive allegations thereof, this Court (Judge Ford) on July 30, 1962, after trial, having entered judgment for defendants holding that no violation of the Sherman Act had been shown (208 F. Supp. 457), plaintiff having appealed to the Supreme Court of the United States, the Supreme Court having on April 6, 1964 reversed the judgment of this Court and having held that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company violated Section 1 of the Sherman Act and having declined to review the questions posed by the complaint under Section 2 of the Sherman Act, and having remanded the case to this Court for further proceedings in conformity with its opinion (376 U.S. 665), the Bank Merger Act (Public Law 86-463, 74 Stat. 129) having been amended on February 21, 1966 (Public Law 89-356, 80 Stat. 7), plaintiff on April 28, 1966 having filed its motion in this Court for an adjudication that the aforesaid merger violates Section 2 of the Sherman Act, this Court on February 1, 1967, having filed its order denying said motion and having filed its opinion upholding said merger, plaintiff on March 30, 1967, having filed its notice of appeal to the Supreme Court of the United States, plaintiff and defendant First Security National Bank and Trust Company of Lexington, by their respective attorneys, having each consented to the making and entry of this Final Judgment without this Final Judgment constituting any evidence or an admission by either party hereto with respect to any issue of fact or law herein, and

this Court having considered the matter and being duly advised.

Now, therefore, upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed, as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against First Security National Bank and Trust Company of Lexington under Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "First Security" means defendant First Security National Bank and Trust Company of Lexington which is a consolidation of defendant First National Bank and Trust Company of Lexington and defendant Security Trust Company.

(B) "Trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as (1) trustee; (2) executor; or (3) custodian of securities or other property.

(C) "Non-testamentary trust account" means any account held in the Trust Department of a commercial bank or trust company in Fayette County, Kentucky in its capacity as trustee or custodian of securities or other property in which the trusteeship or custodianship was not created by Last Will and Testament.

III.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acquiring control over or merging with any other commercial bank having one or more offices in Fayette County, Kentucky.

IV.

Defendant First Security is enjoined and restrained for five (5) years from the effective date of this Final Judgment from establishing any additional branch banking offices in Fayette County, Kentucky if, as a result of the establishment of such branch, defendant First Security would own or control more than one third of the total number of offices conducting a commercial banking business in Fayette County, Kentucky.

V.

Defendant First Security is enjoined and restrained for ten (10) years from the effective date of this Final Judgment from acting as trustee or custodian of any non-testamentary trust account created subsequent to the effective date of this Final Judgment; provided, however, that nothing in this Final Judgment shall prevent defendant First Security from acting as trustee or custodian of any assets pursuant to an agreement executed at any time by any person (or spouse of any person) who is or at any time hereafter becomes an officer, director (including advisory directors) or employee of defendant First Security.

VI.

Defendant First Security may petition this Court at any time for [or ?] times after January 1, 1969 to modify this Final Judgment by striking Section V therefrom and any such petition shall be granted if defendant First Security shall

show to the satisfaction of this Court that in the year preceding the filing of such petition, it was acting as trustee, executor and/or custodian of either less than 25% by number, or less than 50% by dollar value of total assets (or both), of all trust accounts held by commercial banks in Fayette County, Kentucky. Plaintiff shall cooperate with defendant First Security in obtaining statistics showing the number and dollar value of trust accounts.

VII.

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to First Security at its principal office, be permitted:

(1) Reasonable access, during office hours of First Security, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of First Security relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of First Security and without restraint or interference from it, to interview officers or employees of First Security, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, First Security, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such reasonable reports in writing to the Department of Justice

with respect to matters contained in this Final Judgment as may, from time to time, be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the executive branch of plaintiff except in the course of court proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII.

Jurisdiction is retained by this Court for the purpose stated in the Section VI of this Final Judgment and for the purposes of enabling any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the modification or termination of any provision thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

/s/ Mac Swinford
*United States District Judge*

Dated: December 29, 1967

## APPENDIX E

### Order

The motion to adjudicate the First National Bank and Trust Company of Lexington and the Security Trust Company as in violation of Section 2 of the Sherman Act and for the entry of a final judgment of divestiture is overruled. See opinion this day filed.

/s/ MAC SWINFORD
Mac Swinford, *Judge*

February 1, 1967.

---

## APPENDIX F

### Opinion

SWINFORD, Chief Judge.

A detailed recitation of the history of this case is unnecessary and impertinent to an understanding of the decision on the matter now to be determined. In the interest of clarity of the conclusions reached, I must, however, preface this opinion with a brief summary of the steps which have brought the litigation to this stage.

The complaint in this action was filed on March 1, 1961 and alleged that the merger of the defendants, First National Bank and Trust Company of Lexington and the Security Trust Company, was a violation of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. After a somewhat extended trial on the merits, this court on July 27, 1962 held that the merger was not in violation of either Section 1 or 2 of the Sherman Act and dismissed the complaint. The case was heard and the decision made by Honorable Hiram Church Ford, at that time Chief Judge of the Eastern District of Kentucky and presently serving as a Senior Judge in this district. See opinion, 208 F.Supp. 457.

On April 6, 1964 the Supreme Court reversed the judgment and held that the merger was in violation of Section 1 of the Sherman Act but did not determine the question posed by Section 2 of that Act. See opinion, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1.

On March 18, 1965 this court entered an order requiring divestiture of the properties belonging to the consolidated banking institution and ordered and directed the creation of a separate, competitive and independent commercial bank to be the equivalent of the former Security Trust Company. Before the divestiture and related orders of the court were effected, the Congress of the United States enacted Public Law 89-356, 80 Stat. 7. This Act became law on February 21, 1966 and provides in pertinent part as follows:

> "Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)."

The record is before the court on the following motion:

> "The United States of America, plaintiff herein, hereby moves the Court, on the record herein and on the grounds set forth in the attached affidavit of Lawrence F. Noble, for an adjudication that the merger of the defendants First National Bank and Trust Company of Lexington and Security Trust Company is in violation of section 2 of the Sherman Act (15 U.S.C. 2) and

for the entry of a final judgment of divestiture pursuant to that adjudication."

The motion is overruled for the following reasons.

Since the Supreme Court did not reverse the decision of this court on Section 2 of the Sherman Act, that ruling is the law of the case. The case was thoroughly and carefully tried and the issues determined by Judge Ford and so far as I am concerned that concludes the matter. For a judge of coordinate jurisdiction to reverse a judgment of a fellow judge who tried the case, saw and heard the witnesses testify and recorded his findings and conclusions, both of law and fact, in a lucid opinion, is to do disservice to the law and create disrespect for it. There must be an end to litigation and I can well understand why lay people would be thoroughly confused if a question of law at nine o'clock was decided by one judge and at ten o'clock the same question in the same case was decided to the contrary by another judge from the same bench. While there may be instances in which such a reversal would be justified, this is not one of them. Such a legal prerogative is questionable under any circumstance and I personally hold to the view that the law would be best served if reviews of decisions of trial judges were limited to appellate tribunals.

Notwithstanding my personal view of the matter, I recognize that a judge of coordinate jurisdiction does have the power to reexamine a prior decision of a fellow judge where there is a patent error. I find no such error in this record. A succinct statement of the law on this subject is found in the following quotation from the opinion in the case of In Re Carmona, D.C., 224 F.Supp. 497.

"It is also expressed in the many cases which hold that 'judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other,' except in the most unusual circumstances. TCF Film Corp. v. Gourley, 240 F.2d

711 (3d Cir. 1957). See, United States v. Wheeler, 256 F.2d 745 (3 Cir.), cert. denied, 358 U.S. 873, 79 S.Ct. 111, 3 L.Ed.2d 103, rehearing denied, 358 U.S. 913, 79 S.Ct. 229, 3 L.Ed.2d 234 (1958), and Carnegie Nat. Bank v. City of Wolf Point, 110 F.2d 569 (9th Cir. 1940). A further expression of this concept is found in the rule that where a judge has decided the effect of a particular document or transaction, a judge of co-ordinate jurisdiction should not, even in an entirely separate case, decide that the same document is of a different effect. See e. g. United States v. Citizens National Trust and Savings Bank, 166 F.Supp. 410 (S.D. Cal. 1958), affirmed, 270 F.2d 128 (9th Cir. 1959),

"Finally, this important principle has given rise to another rule, which is directly applicable to the case at hand. That is the rule that where a judge has decided a question of law in one manner a judge of co-ordinate jurisdiction should not normally undertake to decide it another way. This rule, based upon judicial comity as well as good judicial administration, is of great universality. See e. g., In re Naturalization of Alacar, 196 F.Supp. 564 (D.Hawaii 1961); Rojas-Gutierrez v. Hoy, 161 F.Supp. 448 (S.D.Cal. 1958), affirmed, 267 F.2d 490 (9th Cir. 1959); Brusselback v. Cago Corp., 24 F.Supp. 524 (S.D.N.Y. 1938); and the multitude of federal and state court cases cited in 21 C.J.S. Courts § 196, note 94."

In the second place, it is my judgment that it was the intention of the Congress by the enactment of the Bank Merger Act to immunize this particular merger from all further attacks on the ground that it violated the law. I do not have the report of the House Committee on Banking and Currency before me, but the brief for the defendants quotes the following from the report and as so represented to the court I consider it authentic:

"Your Committee considered carefully what to do with the six banks against which the Department of Justice now has cases pending. The Attorney General strenuously opposed any legislation which might relieve these six banks from further prosecution under the antitrust laws. Other witnesses urged equally strongly that all six mergers should be relieved of any further liability under the antitrust laws. Three of these mergers were consummated and the antitrust suits instituted before June 17, 1963, when the Supreme Court for the first time (United States v. Philadelphia National Bank, 374 U.S. 321 [83 S.Ct. 1715, 10 L.Ed.2d 915]) held that bank mergers were subject to section 7 of the Clayton Act. These three cases were the Lexington, Ky., merger, the Manufacturers Hanover merger in New York City, and the Continental Illinois merger in Chicago. Three other mergers—in California, Tennessee, and St. Louis—were consummated after the Philadelphia decision and with knowledge of its possible effect on their situations.

"Under these conditions, your committee took the position that the first three mergers—the 'pre-Philadelphia' mergers—(of which defendant's was one) should be exempted from Section 7 of the Clayton Act and section 1 of the Sherman Act, like all other mergers consummated before the Philadelphia case. These three banks, acting in good faith, and their depositors and other customers and their communities should not be required to suffer the confusion, the disruption, and the losses which would result from efforts to unscramble them."

In the light of the whole history of this litigation and as the record now stands, it is my opinion that the merger of these two banking houses must be upheld.

An order in conformity with this opinion is this day entered.

February 1, 1967

## APPENDIX G

### Order

The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May 4, 1964, reversed the judgment of this Court and remanded this cause for proceedings in conformity with its opinion.

It is ORDERED, ADJUDGED AND DECREED as follows:

I

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

II

The directors of First Security National Bank and Trust Company who were directors of First National Bank and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

The United States Department of Justice shall have authority to examine and inspect all the records of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the bank as to the progress made in fulfilling the purpose of this order.

V

The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any

effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

-/s/ MAC SWINFORD
Mac Swinford, *Judge*

March 18, 1965

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## APPENDIX H

### Order of Clarification of Order of Divestiture of March 18, 1965

This cause coming on for hearing before the Court on petition of the defendant for clarification of an order of divestiture entered herein on March 18, 1965, and the plaintiff having filed its response thereto in which it concurred in the petition for clarification, and the Court, having heard arguments of counsel thereon and being advised, grants the petition for clarification and in accordance therewith it is ordered and adjudged as follows:

I

That Paragraph I of the order of March 18, 1965, be clarified so as to read as follows:

Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former

Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to the limitations on the eligibility of stock to be voted as hereinafter set out to insure the independence of operation of the banks, all of the capital stock (except directors' qualifying shares) of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this Court to be distributed pro rata to those persons who are the shareholders of First National Bank and Trust Company of Lexington (formerly First Security National Bank and Trust Company of Lexington) at the time of said distribution.

There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created.

The limitations on the eligibility of stock to be voted are as follows:

(A) To assure the independence of operation of the banks, each bank shall for a period of ten (10) years provide plaintiff reasonable notice and an opportunity to apply to the Court for such orders as may be necessary concerning the manner in which the bank proposes to vote these shares of the other bank held in its trust department not treated, pursuant to the provisions of paragraph (B) hereof, as stock held by the beneficial owners. Each bank shall also take all such steps as may reasonably be required to secure the instructions of the beneficial owners of such shares concerning the manner in which such shares are to be voted.

(B) The by-laws of each of the banks shall contain limitations on the eligibility for voting, in any election of directors or plan of merger or consolidation, of those shares in excess of 1% of its outstanding shares which are owned or controlled, directly or indirectly, by any stockholder who owns or controls, directly or indirectly, more than 1% of the outstanding shares of the other bank. The by-laws shall further provide that shares held in the trust department of any bank or trust company in a fiduciary capacity shall be treated as owned or controlled only by the beneficial owner thereof when voted by a co-trustee not associated with the bank or trust company or where the bank or trust company has notified in writing the beneficiaries of the trusts requesting their instructions as to voting and has received written instructions from the beneficiaries concerning the manner in which such stock is to be voted and votes such stock in accordance with such instructions. The bank or trust company may, subject to the provisions of paragraph (A) hereof, exercise such voting power as has been given by the trust instrument if the beneficiaries shall fail to respond to the timely request of the bank or trust company for instructions as to voting, or if there is no living beneficiary competent to give such instructions.

II

Section III of the order of this Court of March 18, 1965, is hereby clarified as follows:

The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National

Bank and Trust Company of Lexington. All of the foregoing acts shall be completed immediately after the banking association to be formed pursuant to Section I of the order of this Court of March 18, 1965, opens its doors for business.

/s/ MAC SWINFORD
*United States District Judge*

April 29, 1965

## APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

### Order

This cause coming on to be heard on motion of the plaintiff for a temporary restraining order enjoining defendants named in the caption from taking any steps in furtherance of an agreement between First National Bank and Trust Company of Lexington and Security Trust Company to merge and consolidate, and the Court having heard statements of counsel and having considered same together with affidavits submitted by plaintiff in support of its motion and the verified response filed by defendant, First Security National Bank and Trust Company of Lexington herein, and it appearing to the Court that pursuant to the approval of the Comptroller of the Currency of the United States the first National Bank and Trust Company of Lexington and Security Trust Company were consolidated as of the opening of business on March 1, 1961, into defendant First Security National Bank and Trust Company of Lexington as a National Banking Association under the laws of the United States; and the Court being advised, it is now ordered and adjudged as follows:

1. That defendant, First Security National Bank and Trust Company of Lexington, as a National Banking Association under the laws of the United States, is duly author-

ized to conduct and carry on a banking business in Lexington, Kentucky;

2. Until the further orders of the Court, the defendant, First Security National Bank and Trust Company of Lexington, shall insofar as may be reasonably possible under the national banking law of the United States and the applicable regulations of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation, and in accordance with sound banking practices, keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, its capital stock, assets, liabilities and accounts can be equitably divided between the consolidating banks in accordance with their respective rights;

3. Pursuant to paragraph 2 hereof, defendant shall:

(a) Keep and maintain stock ledgers and records adequate to show which shares of stock in the consolidated bank have been or are issued in exchange for stock in each of the consolidating banks and preserve all stock certificates of the consolidating banks received in exchange therefor;

(b) Keep and maintain trust records showing which of the consolidating banks was named by the settlor or testator as the fiduciary; and as to qualifications prior to March 1, 1961, showing which of said consolidating banks originally qualified as fiduciary;

(c) Keep and maintain records adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961;

(d) Keep and maintain records adequate to identify all equipment, materials, employees, and real or personal property, investments and securities belonging to each of the

consolidating banks or their customers as of the close of business on February 28, 1961;

(e) Keep and maintain records adequate to identify all notes and other obligations held by each of the consolidating banks as of the close of business on February 28, 1961;

(f) Keep and maintain the present Trust Departments of the consolidating banks as at February 28, 1961, at their present locations and with substantially the same personnel;

(g) Keep and maintain records adequate to identify which accounts, notes, loans and other transactions are had with customers who were not customers of either of the consolidating banks prior to March 1, 1961;

4. This order shall continue in full force and effect until further orders of the Court and shall make unnecessary any hearing on the motion for temporary injunction heretofore assigned for Friday, March 10, 1961. The Court reserves the right to make any modification or supplemental orders that may be necessary from time to time in the premises.

5. This case is assigned for trial to the Court in the Federal Court Room at Lexington, Kentucky, on Monday, May 1, 1961, beginning at 9 A.M. (Eastern Standard time) or as soon thereafter as it can be reached in the procedure of the Court.

H. CHURCH FORD
*Judge*

March 6, 1961

## APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

### Plaintiff-Intervenor Complaint

Plaintiff-Intervenor, Dages I. Boyle, on behalf of himself and First National Bank and Trust Company of Lexington, and Security Trust Company, for his intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Dages I. Boyle, is a citizen and resident of Fayette County, Kentucky, is a stockholder in defendant Security Trust Company, owning stock therein as appears of record on its corporate books, and is also a stockholder of First Security National Bank and Trust Company of Lexington, owning stock therein as appears of record in its corporate books and was prior to and at the time of merger of defendants a stockholder in each of said banks.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judgment and order was entered

pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965 final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89-356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Sherman Act, even though the United States Supreme Court held in a final judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the Vth Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Dages I. Boyle, has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Dages I. Boyle, is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Dages I. Boyle, demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. His cost herein expended and such other relief to which he may be entitled.

Respectfully submitted,

FRANK GINOCCHIO
Frank Ginocchio,
Lexington, Kentucky

EARL W. WILSON,
Earl W. Wilson,
Lexington, Kentucky

*Of Counsel:*

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1100 Federal Bar Building
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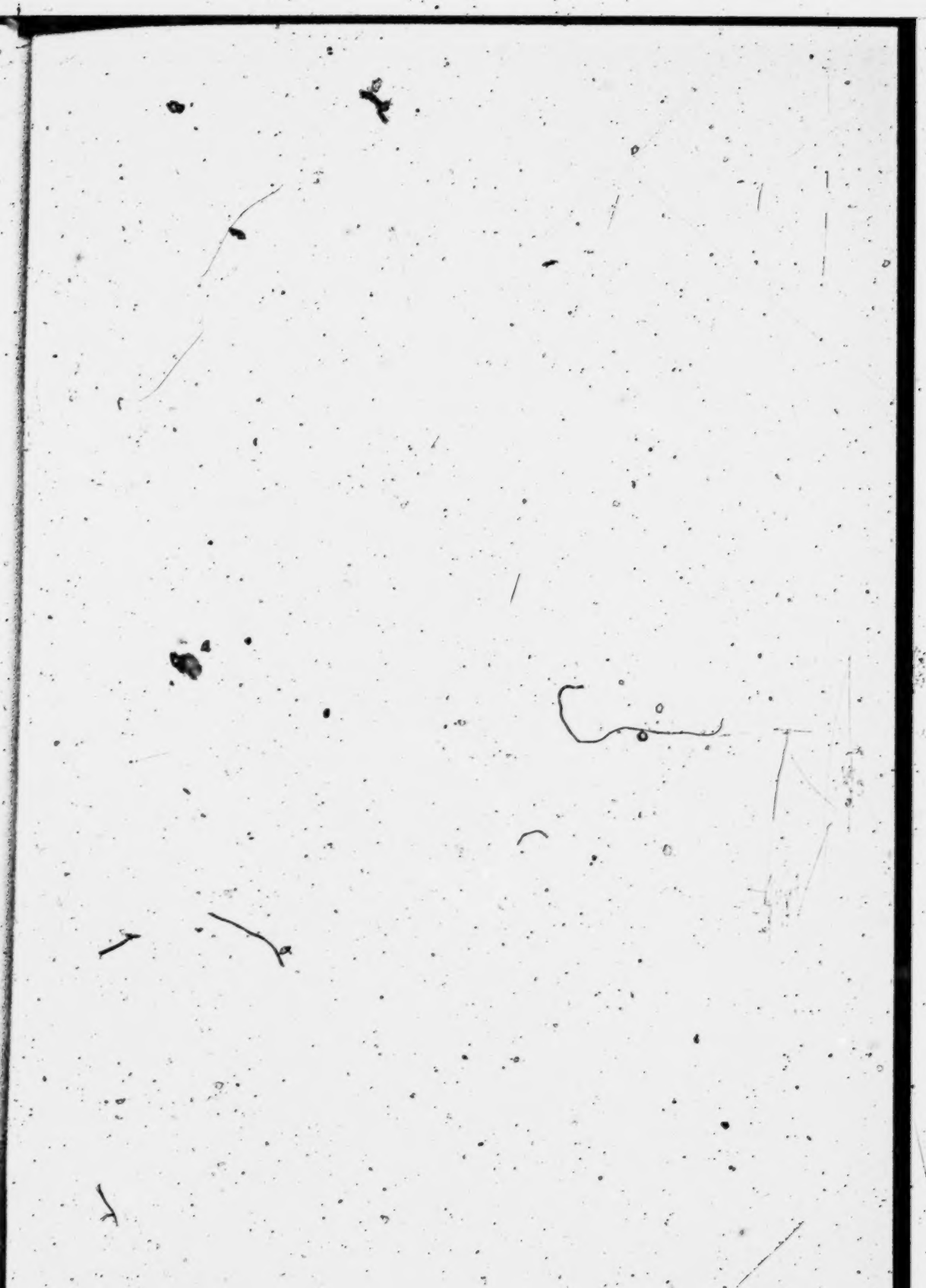
Washington, D. C. 20006

Dated: September 15, 1967



Nos. 1269 and 1270

FILED
MAY 10 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

**On Appeals from the United States District Court for the Eastern District of Kentucky**

## MOTION TO AFFIRM OF APPELLEES FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON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May 10, 1968


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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Nos. 1269 and 1270

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CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

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DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

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**On Appeals from the United States District Court for the Eastern District of Kentucky**

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## MOTION TO AFFIRM OF APPELLEES FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

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Appellees First National Bank and Trust Company of Lexington ("First National"), Security Trust Company ("Security Trust"), and First Security National Bank and Trust Company of Lexington ("First

Security")[1] move pursuant to Rule 16 of the Rules of this Court that the order and judgment of the district court, entered on December 29, 1967, be affirmed with respect to the questions raised by the appeals in Nos. 1269 and 1270, on the ground that it is manifest that the questions on which the decision of these causes depend are so unsubstantial as not to need further argument.

## QUESTIONS PRESENTED

The questions on which the decision of these appeals depends are as follows:

1. Whether the district court properly entered the final judgment proposed by the United States and First Security.

2. Whether the consent of the intervening parties to the terms of the judgment proposed by the United States and First Security was required before the district court could enter that judgment.

3. Whether the Bank Merger Act amendment of 1966 is constitutional insofar as it enacted a conclusive presumption that the consolidation of First National and Security Trust did not violate section 1 of the Sherman Act, when such enactment occurred after this Court's judgment that the consolidation violated section 1 but before the execution of an order of divestiture entered in conformity with that judgment.

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[1] First National and Security Trust were consolidated with the name First Security National Bank and Trust Company of Lexington pursuant to a new charter issued by the Comptroller of the Currency on March 1, 1961. On that date First National and Security Trust ceased to operate as separate entities.

## STATEMENT

On March 1, 1961 First National Bank and Trust Company of Lexington and Security Trust Company consummated a consolidation that had been theretofore approved by the Comptroller of the Currency. On the same day a complaint was filed by the United States alleging that the consolidation violated sections 1 and 2 of the Sherman Act (Doc. 1).[2]

The case came on for trial in February 1962, and on July 27, 1962 the district court (Ford, J.) entered its opinion holding that the consolidation did not violate either section 1 or section 2 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D. Ky. 1962). An appeal was duly taken to this Court by the United States from the district court's judgment. In this Court the United States contended that the district court erred on both counts and that the consolidation violated both section 1 and section 2 of the Sherman Act.

In April 1964 this Court held that the consolidation violated section 1 of the Sherman Act. *United States* v. *First National Bank & Trust Co.*, 376 U.S. 665 (1964). Pursuant to that holding the Court reversed the judgment of the district court and remanded the case to the district court for further proceedings in conformity with the opinion of this Court. Notably, this Court did not upset the district court's ruling that the consolidation did not violate section 2 of the Sherman Act,[3] nor did it direct divestiture.

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[2] This Motion will follow the system of record citation employed by appellant Central (Central Jurisdictional Statement, p. 4 n.2).

[3] The Court stated (376 U.S. at 673):

> In view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2.

After the case was remanded, the parties, on February 16, 1965, filed in the district court a stipulation proposing a decree to be entered by the district court. (Doc. 164.) The proposed decree recited that the consolidation violated section 1 of the Sherman Act.[4] The district court (Swinford, J.) rejected the form of decree proposed by the parties, and on March 18, 1965 entered a separate order.[5] (Doc. 178; App. G to Jurisdictional Statements.)

On February 21, 1966, Congress enacted an amendment to the Bank Merger Act of 1960.[6] P.L. 89-356, 80 Stat. 7. This amendment had two principal purposes: First, it "forgave" from any violations of the antitrust laws (except section 2 of the Sherman Act) all mergers that had been consummated before June 17, 1963[7] and that had not, as of the date of the

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[4] The proposed decree made no reference to section 2 of the Sherman Act.

[5] The court's order of March 18, 1965, was amended and clarified by a subsequent order of April 29, 1965. (Doc. 191; App. H to Jurisdictional Statements.) As amended, the court's order was essentially similar to the decree originally proposed by the parties.

[6] Although the amendment was not enacted until 1966, the legislative proceedings that led to its enactment began in April 1965—shortly after the district court entered its decree in this case—with the introduction of S.1698, the bill that was eventually enacted into law with a number of amendments. S. 1698 was passed by the Senate on June 11, 1965.

[7] This was the date of this Court's decision in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

In the *Philadelphia* case, this Court held that a merger transaction approved under the Bank Merger Act of 1960 was not thereby immune from the antitrust laws. In amending the Act in 1966, Congress expressed the belief that prior to this decision it was not clear that the 1960 Act created no such immunity. In view of this uncertainty it was felt, therefore, that banks that had merged on the good faith assumption that such an exemption existed should not be required to split apart upon a subsequent judgment of antitrust illegality. H. Rep. No. 1221, 89th Cong., 2d Sess. 4-5 (1966).

amendment, been dissolved pursuant to a final antitrust judgment. Second, it established new standards and procedures for determining the legality of subsequent mergers.[8] The forgiveness of "pre-*Philadelphia*" mergers was accomplished by the enactment of a conclusive presumption in section 2(a) of the 1966 amendment:

> Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

Some two months after the enactment of the 1966 amendment the United States moved the district court for an adjudication that the consolidation violated section 2 of the Sherman Act and prayed that a final judgment of divestiture be entered pursuant to that adjudication. (Doc. 202.) The district court denied this motion on February 1, 1967, for two reasons: First, the court held that because the Supreme Court had not reversed the 1962 ruling by the district court that the merger did not violate section 2 of the Sherman Act, the 1962 ruling was the law of the case.[9] Second, the

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[8] The provisions of the 1966 amendment setting forth these new standards and procedures were before the Court in *United States* v. *Third Nat'l Bank of Nashville*, — U.S. — (1968) and *United States* v. *First City Nat'l Bank*, 386 U.S. 361 (1967).

[9] Judge Swinford recognized that he had power to reexamine the earlier ruling if there were patent error in it, but he found no such error in the record. (Doc. 208, p. 3.)

court was of the opinion that in enacting the 1966 amendment Congress intended that the consolidation under attack in this case should not undergo divestiture.[10] (Doc. 208.)

The United States' notice of appeal to this Court from the district court's order was filed March 31, 1967. (Doc. 210.) The time for docketing the record in this Court was extended while the parties negotiated an agreed form of judgment to present to the district court. Such proposed judgment was filed by stipulation of the parties on August 7, 1967. As amended on September 1, 1967, this stipulation provided that the proposed judgment could be entered by the court at any time after 40 days from the filing of the stipulation. In accordance with its usual practice the United

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[10] This is amply supported by the legislative history. The report of the House Committee on Banking and Currency stated that the banks that had merged prior to the *Philadelphia* decision—Manufacturers Hanover in New York, Continental Illinois in Chicago, and First Security in Lexington—

> should not be required to suffer the confusion, the disruption, and the losses which would result from efforts to unscramble them.

H. Rep. No. 1221, 89th Cong., 2d Sess. 4 (1966). It is thus evident that while Congress did not intend to exculpate either past or present mergers from violations of section 2, it intended to relieve the pre-*Philadelphia* mergers from the far-reaching problems of divestiture. Indeed, statements in Floor debate by the Chairmen of the House and Senate Committees indicate their clear understanding that the amendment would actually end this litigation. *See* 112 Cong. Rec. 2334 (daily ed. Feb. 8, 1966) (remarks of Chairman Patman) (pre-*Philadelphia* mergers would "be granted exemption from further action by the Justice Department"); (112 Cong. Rec. 2538 (daily ed. Feb. 9, 1966) (remarks of Chairman Robertson) ("bill would terminate the three pre-*Philadelphia* cases now pending in court"). The Manufacturers Hanover and Continental Illinois cases were promptly dismissed after passage of the 1966 amendment.

States reserved the right to withdraw its consent to the proposed judgment within the 40-day period.[11]

During this period appellants Central Bank and Trust Company ("Central") and Dages I. Boyle ("Boyle") presented their views on the proposed decree to the Department of Justice. (Doc. 222, Affidavit of Garvice Kincaid, p. 4) In addition, appellants moved to intervene in this case for the purpose of opposing the proposed decree.[12] (Docs. 217, 225)

On December 29, 1967, the district court entered an order (1) granting appellants' motions to intervene as parties plaintiff, (2) denying the other relief requested by appellants, and (3) entering the final judgment proposed by the United States and the appellee banks. It is from this order that these appeals are taken.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY ENTERED THE FINAL JUDGMENT PROPOSED BY THE UNITED STATES AND FIRST SECURITY

The final judgment proposed to the court below by the appellees represented a good faith effort to terminate litigation that had been pending for six and one-half years. At the time the judgment was proposed, the consolidation of First National and Security Trust

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[11] The Justice Department's consent judgment policy is set forth in full at 28 C.F.R. § 50.1.

[12] Appellant Central filed motions asking (1) that the court not accept the proposed final judgment, and (2) that the court reconsider its order of February 1, 1967 denying the United States' motion for adjudication that the consolidation violated section 2 of the Sherman Act. (Docs. 220, 221.)

Appellant Boyle filed a motion asking the court not to accept the proposed final judgment and to enforce its divestiture order of March 18, 1965. (Doc. 227.)

had been immunized from further attack under any of the antitrust laws except section 2 of the Sherman Act. At that time, moreover, no court had ever held that the consolidation violated section 2.

The proposed judgment, as is the case with any settlement agreement, accommodated the interests of both the public and the appellee banks. From First Security's point of view, acceptance of the terms of the decree, which resulted from long and hard negotiations, was preferable to the uncertainty of additional protracted litigation.[13] From the public's point of view the decree imposed significant restraints upon First Security[14] even though the district court had twice ruled the consolidation not in violation of section 2 and this Court had never ruled to the contrary.

This Court has held that the scope of review in this Court of an antitrust decree entered by consent in a district court is an extremely narrow one. In *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689 (1961), the Court indicated that the "wisdom of the

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[13] Inasmuch as the record in this case closed in 1962, First Security faced the substantial possibility, in the event an appeal had been pursued by the United States, that the record would be reopened and new evidence would have to be taken before the section 2 claim could be adjudicated. It was entirely possible, therefore, that this case could have continued for as long as two years more in active litigation.

[14] The decree enjoins First Security (1) for ten years from acquiring any other commercial bank having an office in Fayette County, (2) for five years from establishing any branch office in Fayette County if such action would give the bank more than one-third of the commercial bank offices in the county, and (3) for ten years from accepting any new nontestamentary trust accounts (except from officers, directors and employees of the bank).

Government's judgment in negotiating and accepting" a decree entered by the lower court should not be subject to review "at least in the absence of any claim of bad faith or malfeasance on the part of the Government." The appellants in this case expressly stated to the court below, in their attack on the proposed decree, that they were *not* charging the United States with bad faith or malfeasance. Indeed, they conceded that the Department of Justice was acting in good faith. (Doc. 252, Transcript of Hearing on Motions, pp. 52-53.)

The district court, of course, had to be satisfied before entering the decree that it would be equitable and in the public interest. *United States* v. *F & M Schaefer Brewing Co.*, 1968 Trade Cas. ¶ 72345 (E.D.N.Y. 1967); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-48 (S.D.N.Y. 1962); *United States* v. *Radio Corp. of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). We submit that the court below did satisfy itself in this respect. The merits of the decree were fully argued before the district court and appellants raised all of the objections to the terms of the decree that are being raised in this Court. After a full day of oral argument and the submission of extensive briefs by the parties, the district court held that the proposed judgment should be entered. Despite the vigorous attack made upon the substance of the proposal by the appellants, the court did not find any merit in these arguments. Moreover, while the court indicated some surprise that the Government had elected to settle the case, it was careful to point out that it did "not mean to imply that the

United States has not conscientiously represented the public interest."[15] (Jurisdictional Statement, p. 6a.)

Finally, the fact that the lower court was fully aware of its duty to examine the substance of a proposed decree and its power to reject such a decree was amply evidenced in March of 1965, when the court rejected the earlier decree proposed by the parties and instead entered its own decree. It is inconceivable in view of this background that the court would have considered itself bound to enter *any* decree the parties may have agreed upon.

The appellants' attack on the proposed decree is, moreover, wholly without merit. Appellants' main contention is that the decree should have been rejected because it failed to provide for divestiture,[16] which, they argue, is the conventional remedy for a violation

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[15] This quotation from the court's opinion flatly contradicts appellant Central's suggestion (Jurisdictional Statement, p. 13) that the court recognized that the Government was *not* adequately representing the public interest. Moreover, contrary to Central's assertion (Jurisdictional Statement, p. 17) the court did *not* indicate that the *decree* was contrary to the public interest. The court's concern was that *any* settlement of the case at this stage of the litigation might create "a feeling of uneasiness in the public mind." The court did not question the Government's judgment with respect to the substance of the decree; it merely questioned its judgment "in not permitting this case to go to a final decision by the Supreme Court." Inasmuch as the court expressed this reservation it may be assumed the court would promptly have rejected the proposed decree if it believed that the terms of the decree were not in the public interest.

[16] Central also argues that the consent judgment "contains a large loophole" (Central Jurisdictional Statement, p. 24) because it does not preclude First Security from accepting nontestamentary trusts from "advisory" directors and that the bank could create an unlimited number of such directors. This argument is frivolous and was properly rejected by the district court. If First Security were to attempt to nullify the decree by wanton proliferation of advisory directors merely to secure their trust business appropriate relief could certainly be had in the district court.

of section 2 of the Sherman Act. This argument again fails to take account of the fact that the consolidation of First National and Security Trust has twice been adjudged not to be in violation of section 2 and has *never* been adjudged to violate that section. If, as appellants suggest, an antitrust case cannot be settled prior to final judgment except on the same terms that would be imposed after a judgment in favor of the United States, there is little incentive for defendants to settle.[17]

Moreover, assuming the United States had pursued an appeal successfully, the only violation of section 2 that could realistically have been expected would have related to the sub-market of corporate trust services, and presumably the ultimate relief would have been limited to that necessary to cure the anticompetitive effects in that market. Divestiture of trust business, or any part of it, is fraught with legal difficulties. Each trust sought to be divested would potentially have been the subject of ancillary proceedings in state courts to approve a substituted trustee, with the result that an unseemly clash between federal and state courts might have resulted. The United States sought to achieve a result comparable to divestiture by limiting First Security's ability to accept new trust business.[18]

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[17] There is a clear congressional policy, embodied in section 5 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 16, favoring settlement of Government antitrust litigation. *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964).

[18] Government counsel pointed out to the district court that the decree's restrictions were designed to reduce First Security's share of the Trust market to 20 percent, by number of accounts, and to 50 percent by dollar value. (Doc. 252, Transcript of Hearing on Motions, p. 78.) The limitation of the restriction in the decree to nontestamentary trust business recognized the inequitable result that would otherwise occur when a testator who had named First Security as trustee of a testamentary trust died without knowledge of the bank's inability to accept such an appointment.

Finally, this Court itself has recognized in this very case the fact that there are peculiar difficulties relating to divestiture in a bank merger case.[19] As the Court pointed out in *First Security Nat'l Bank & Trust Co.* v. *United States*, 382 U.S. 34, 35 (1965)

> Neither the opinion nor the judgment of this Court [on the first appeal in this case] expressly dealt with the matter of remedy and neither ordered divestiture within any particular period of time. Compare *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (decided the same day as the prior appeal in this case and directing the District Court to order divestiture without delay).

The implication of this language is that relief short of divestiture may be appropriate in a case involving mergers of commercial banks.

Moreover, as is amply clear from the legislative history of the 1966 amendment to the Bank Merger Act, the overwhelming considerations that moved Congress to forgive this very consolidation from the strictures of section 1 of the Sherman Act were the problems and inequities of divestiture. See S. Rep. No. 299, 89th Cong., 1st Sess. 7 (1965); H. Rep. No. 1221, 89th Cong., 2d Sess. 4-5 (1966); 112 Cong. Rec. 2334 (daily ed. Feb. 8, 1966) (remarks of Rep. Patman) ("A majority of your committee felt that . . . equity demanded further exemption of [pre-*Philadelphia*] mergers from prosecution because there was doubt prior to the *Philadelphia* case as to whether the antitrust laws applied to banks.").

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[19] As appellant Central has noted (Jurisdictional Statement, p. 22 n.7) problems of divestiture in this case were explicitly argued to this Court on First Security's Motion to Remand at the time of the first appeal.

## II. THE CONSENT OF THE APPELLANTS WAS NOT A PREREQUISITE TO THE ENTRY OF THE PROPOSED JUDGMENT

Appellants contend that it was error for the district court to enter the judgment proposed by the appellees without the consent of the intervening plaintiffs.[20] This argument was not raised in the court below, and therefore need not be considered by this Court.

Apart from this, the argument is unsound as a matter of policy, for it would quite obviously prevent the settlement of *any* Government antitrust case in which a competitor of the defendant had been permitted to intervene. In addition, it totally misconceives the nature of a so-called "consent judgment" and appellants' status as interveners in this case.

The mere filing by the parties of an agreed form of judgment is not in itself sufficient to terminate the

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[20] Appellant Central also argues that the district court erred in failing to afford it "an opportunity, after it had become a party, to participate in relief hearings and settlement negotiations." (Central Jurisdictional Statement, pp. 3, 15) This argument is utterly frivolous. In the first place, despite the fact that the appellants filed voluminous pleadings in the district court, neither of them ever requested the lower court to hold evidentiary hearings on the merits of the proposed decree or to give them an opportunity to participate in settlement negotiations. This contention is not properly before this Court, therefore. Second, both appellants submitted detailed written and oral comments to the court below on the proper scope of relief and the merits of the proposed decree, and nothing in the arguments they raised warranted additional hearings on either the merits of the decree or the scope of relief. Finally, as is shown by Exhibit A to the "Plaintiff-Intervenor Complaint" filed by Central in the court below (Doc. 218), appellants have been in constant communication with the Department of Justice concerning this consolidation since at least April 1966. To this extent their views were comprehended in the negotiations that led to settlement of the case.

litigation.[21] Action by the court is necessary to give effect to the agreement, and such action constitutes more than the ministerial function of authenticating or recording the agreement of the parties. It involves an exercise of judgment and discretion. *United States* v. *Radio Corporation of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). It is well-established that under appropriate circumstances a court may adopt and enter a proposed judgment despite the fact that less than all of the parties to the case have consented to its terms. In *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962), for example, a judgment proposed by the Government and one of two co-defendants in a civil action under sections 1 and 2 of the Sherman Act was entered over the objection of the nonconsenting defendant.[22] See also *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis.

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[21] *Compare* Fed. R. Civ. P. 41(a)(1)(ii), which provides that an action may be dismissed without order of court "by filing a stipulation of dismissal signed by all parties who have appeared in the action."

[22] In *Carter* the Government had attacked a licensing agreement under which Carter had given American Home Products Corporation an exclusive license (except as to Carter) to use and sell the drug meprobamate. Carter consented to a decree that required it to abrogate the exclusivity terms of the licensing agreement. Despite American's refusal to consent, and its claim that its contract rights would be affected by the decree, the court entered the proposed judgment. The court pointed out that American's rights could be asserted in a separate action on the contract against Carter.

1962) ("consent" judgment entered before trial over objections of Government).[23]

Moreover, while appellants contend that as interveners they are entitled to "all the rights of an original party." (Central Jurisdictional Statement, p. 13), this contention is obviously too broad. The procedural rights appellants acquired as interveners must be related both to the stage of the litigation at which they intervened and to the relief they sought.

It is clear that appellants' intervention at the stage of consent decree proceedings, long after trial and appeal, was for an extremely limited purpose. The only relief they prayed for in their complaints as intervening plaintiffs (Docs. 218, 226) was rejection of the proposed decree and reinstatement of the divestiture decree entered prior to the 1966 amendment to the Bank Merger Act. Adjudication of these claims did not require, nor did appellants request, discovery or evidentiary hearings.[24] The claims raised essentially

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[23] In other cases, courts have, by considering the merits of proposed decrees despite the fact that the parties had not unanimously consented, implicitly recognized that nonconsenting parties have no right to veto a proposed judgment simply by withholding consent. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Calif. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968); *United States* v. *Pan American World Airways, Inc.*, 1959 Trade Cas. ¶ 69,300 (S.D.N.Y. 1959).

[24] The only request made by appellants for further proceedings came in appellant Central's motion asking that the court reconsider its decision of February 1, 1967 denying the Government's motion for an adjudication under section 2. (Doc. 221.) In support of this motion, it urged the court to reopen the record to accept new evidence, proffered in the motion papers, relating to the section 2 issue. Despite the proffer, the court declined to reconsider its ruling sustaining the consolidation for the reasons it had set forth at the time it made that ruling. (Jurisdictional Statements, p. 8a.)

questions of law, and these questions were fully briefed and argued by all parties. Thus, appellants were given their full measure of procedural rights as interveners in the consent decree proceedings, and once their arguments were rejected it was entirely appropriate for the court to enter the decree.

It is also clear that entry of the decree had no effect upon substantive rights of the appellants. Appellants are still free to file a private antitrust action, premised upon an alleged violation of section 2 of the Sherman Act [25] and seeking treble damages [26] and equitable relief under sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 26. If, as they contend here, they have any rights that are distinct from those of the public generally those rights may be vindicated in such a private

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[25] Indeed, appellants might have premised a private suit upon a violation of section 1 of the Sherman Act. While the appellee banks believe that the 1966 amendment would have precluded recovery in such a suit, appellants could have litigated there their contention that the 1966 amendment is unconstitutional insofar as it creates a conclusive presumption of lawfulness.

[26] A claim for damages by appellant Central would seem somewhat speculative, at best. Evidence put before the district court in the consent decree proceeding showed that subsequent to the consolidation Central has for a number of years led all other Lexington banks in deposit gain (Doc. 236, Exs. G-J), that it has followed a "policy of paying the highest possible rate on savings" (Doc. 236, Ex. E), and that it has claimed to be "the most modern bank in the Lexington area incorporating every conceivable banking service." (Doc. 236, Ex. D.) Its share of the total bank deposits in Lexington has increased from 9.66% to 15.51% since the consolidation (while First Security's share has decreased from 51.94% to 47.43%). Central has achieved this rapid growth in market share by capturing over 21% of the total growth in deposits of all Lexington banks. In addition, Central's share of total banking offices in Lexington has increased from 6.67% to 15.38%, while First Security's has decreased from 40% to 26.92%. (Doc. 236, Ex. R.)

action. Indeed, this Court has only recently recognized that where an antitrust consent decree does not impair or impede an interested private party's right to prosecute an action for treble damages, it may be appropriate not only to enter the decree over the private party's objection, but also to deny that party permission to intervene in the consent decree proceeding itself. *City of New York* v. *United States*, — U.S. — (Apr. 22, 1968), *affirming per curiam, United States* v. *Harper & Row Publishers, Inc.*, Civ. No. 67 C 612 (and related cases) (N.D. Ill. 1967).

### III. THE BANK MERGER ACT AMENDMENT OF 1966 IS NOT UNCONSTITUTIONAL AS APPLIED IN THIS CASE

Appellants attack the constitutionality of the 1966 amendment to the Bank Merger Act on three grounds: Both appellants contend that the "forgiveness" provision of the amendment violates the principle of separation of powers. In addition, Boyle contends that this provision violates the Fifth Amendment (1) by depriving stockholders of the constituent banks in the consolidation of "private vested rights" under the earlier judgment in this case, and (2) by arbitrarily discriminating between insured banks and uninsured banks.

#### A. The 1966 Amendment Does Not Violate the Principle of Separation of Powers.

Appellants contend that Congress has no power to "vitiate" or "overrule" a final judgment of a federal court. Therefore, they argue, the enactment in 1966 of a conclusive presumption of legality as to any bank merger consummated prior to June 17, 1963 and not dissolved pursuant to a final antitrust decree as of the date of the enactment is unconstitutional.

These assertions are clearly erroneous. The power of Congress to obviate final judgments of federal courts was settled by this Court over 100 years ago in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

In *Wheeling Bridge* the State of Pennsylvania had filed an original action in this Court to abate a bridge across the Ohio River. The Court held that the bridge was an unlawful obstruction to commerce and decreed that it either be elevated or abated. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 625 (1852). In addition, the Court awarded costs to the plaintiff.

Several months after the decree was rendered, but before the bridge had been elevated or abated, Congress enacted a statute providing that the bridge is "hereby declared to be lawful . . . anything in the law or laws of the United States to the contrary notwithstanding." The defendants relied upon this statute

> as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered . . . .

59 U.S. (18 How.) at 429. In response to this defense the plaintiff urged

> that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff.

59 U.S. (18 How.) at 431. These are precisely the contentions being made in the instant case with respect to the 1966 amendment to the Bank Merger Act.

The Court acknowledged in *Wheeling Bridge* that, as a general principle, when a court renders a final judgment with respect to the private rights of parties, the rights become absolute and must be enforced. But, it went on to say

> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.
>
> But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the public right, which, as we have seen, is under the regulation of congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. *But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance.*

59 U.S. (18 How.) at 431. (Emphasis added.)

Just as the Court's decree in *Wheeling Bridge* directing abatement of the bridge was executory, the district court's March 18, 1965 order of divestiture in this case was executory when the 1966 amendment was enacted. In neither case had the action that had been commanded by the decree been carried out at the time the curative statute was enacted. In such circumstances Congress can constitutionally act so as to legalize the conduct previously found unlawful.[27]

The rule of *Wheeling Bridge* remains unchanged to this day. In case after case the principle has been reaffirmed that where curative legislation intervenes between the rendering of a final injunctive judgment vindicating public rights and the execution of that judgment, the decree cannot be enforced. *See, e.g., The Clinton Bridge,* 77 U.S. (10 Wall.) 454 (1871); *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 146 (1872); *Mills* v. *Green,* 159 U.S. 651, 655-56 (1895); *Hodges* v. *Snyder,* 261 U.S. 600, 603-04 (1923); *System Federation No. 91* v. *Wright,* 364 U.S. 642, 649-50

[27] Appellant contends that *Wheeling Bridge* must be rationalized as a case in which execution of the decree would be "futile", because the bridge could immediately thereafter have been lawfully reconstructed. They contend that this "futility" is not present in the instant case because the amended Bank Merger Act would have precluded a "remerger". The fallacy in this argument is that it ignores the indisputable intention of Congress to legalize *this* merger under section 1 of the Sherman Act. If Congress had believed there was any serious constitutional problem with the provision it enacted, it could just as easily have exempted these banks and this merger *prospectively* from the operation of section 1, making it "futile" to execute the lower court's divestiture order. Under such circumstances, even appellants would concede that no constitutional problem was present. Since the intent of Congress was clear, there seems little reason to accept appellants' strained rationalization of *Wheeling Bridge.*

(1961); *Western Union Telegraph Co.* v. *I.B.E.W., Local No. 134,* 133 F.2d 955, 957 (7th Cir. 1943).[28]

**B. Appellant Boyle Has Not Been Deprived of Vested Rights.**

Appellant Boyle was a shareholder in each of the constituent banks prior to the consolidation. His intervention in this proceeding was allegedly to protect the "vested rights" of old First National and Security Trust and their stockholders. He contends that the district court's divestiture order of March 18, 1965 "required the recreation of Security Trust" and that the order therefore "vested in both First National and Security Trust the right to be recreated." (Boyle Jurisdictional Statement, p. 23) By enacting "forgiveness" legislation, he says, Congress unconstitutionally divested these rights.

Boyle's argument, however, is based upon a patent misconstruction of the order of March 18, 1965. That order did *not* direct that First National and Security Trust be "reestablished" and that all former stockholders be returned to their original positions in each bank. The order simply directed that a new bank be created as a "separate, competitive and independent" bank out of the capital, assets and deposits of First Security and that the new bank "be the *equivalent* of the former Security Trust Company." (Jurisdictional Statements, p. 20a) (Emphasis added.) The clear purpose of this directive was simply to create

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[28] Appellant Central cites *System Federation No. 91* v. *Wright, supra,* for the proposition that it is merely a matter of judicial discretion whether an intervening act of Congress will have the effect of modifying an earlier decree. Central fails to point out, however, that *System Federation No. 91* involved the effect of an enactment upon a *consent* decree, for which the parties had bargained.

a new banking institution so that there would be the same number of competitive entities in Lexington as there were prior to the consolidation. Nothing in that order evidenced any intention to confer private rights upon either the preexisting banks or their shareholders.[29]

### C. The 1966 Amendment Does Not Create Arbitrary Discriminations.

Appellant Boyle argues that the 1966 amendment is unconstitutional because it creates arbitrary and unreasonable discrimination by granting antitrust immunity to insured banks that merged prior to June 17, 1963 while granting no similar immunity to insured banks that merged after that date, or to uninsured banks, or to nonbanking corporations.

It might be noted that Boyle does not claim that the 1966 amendment discriminates *against him.* He simply argues discrimination in the abstract. It is well settled that one to whom application of a statute is constitutional has no standing to attack the statute on the ground that it might apply to other situations in which its application may be unconstitutional. *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Heald* v. *District of Columbia,* 259 U.S. 114, 123 (1922). Apart from his lack of standing, however, the argument is wholly without merit.

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[29] The district court's 1965 decree simply provided for a pro rata "spin-off" of the stock of the new bank to First Security shareholders. Appellant Boyle is patently in error, therefore, in stating that the decree created a right in him to hold stock in the two banks "as he had prior to their consolidation." (Jurisdictional Statement, p. 23.) His relative equity in the two banks after execution of the decree would have borne no relation to his relative equity in the constituent banks prior to the consolidation.

In 1960, when Congress first undertook to impose federal controls over bank mergers, it elected to use federal deposit insurance as the nexus for the assertion of a federal interest. The Bank Merger Act of 1960 enacted an amendment to section 18(c) of the Federal Deposit Insurance Act, 74 Stat. 129. Thus, banks that were not federally insured, which at that time accounted for only 3% of the country's total bank deposits, were not subject to these restraints. H. Rep. No. 1416, 86th Cong., 2d Sess. (1960). In its role as insurer of accounts the federal government had an obvious interest in the health of the banking industry, and it was clearly reasonable for Congress to relate the new restraints to this role.[30]

## CONCLUSION

The merger of First National and Security Trust has been under attack for over seven years. Although the Government's section 2 charges remained alive after the 1966 amendment to the Bank Merger Act, the only judgments ever entered on those charges were adverse to the Government. After lengthy negotiations, the parties arrived at an agreed form of judgment that would not only terminate this protracted litigation, but would impose upon First Security substantial restrictions. Given the uncertainty of the ultimate outcome of the litigation, the peculiar difficulties of effecting a divestiture in a bank merger case, and the clear Congressional purpose in the 1966 amendment to relieve "pre-*Philadelphia*" mergers such as this from these difficulties, the agreed form of judgment that was

[30] Indeed, a substantial Constitutional question might well have been raised had Congress attempted to extend this regulatory scheme to noninsured banks having no federal connections.

accepted and entered by the court below was entirely reasonable.

The appellee banks contend that continued litigation of this case is manifestly not in the public interest and that if the appellants have any private rights to vindicate they may attempt to do so in a private action under the Clayton Act. Accordingly, we submit that this proceeding should at last be brought to an end and that the judgment of the district court should be summarily affirmed.

Respectfully submitted,

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May 10, 1968

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1269

CENTRAL BANK AND TRUST CO., APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

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No. 1270

DAGES I. BOYLE, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY*

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**MOTION TO AFFIRM**

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

**STATEMENT**

These are direct appeals from a consent judgment entered in a government civil antitrust action challenging a bank merger in Lexington, Kentucky. The

merger combined First National Bank & Trust Company of Lexington, Kentucky ("First National") and Security Trust Company ("Security") to form First Security National Bank & Trust Company of Lexington, Kentucky ("First Security"). The day of the merger (March 1, 1961), the United States filed a complaint charging that it was a combination in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and a combination and an attempt to monopolize in violation of Section 2 of that Act.

1. First National had been the largest of six commercial banks in Fayette County, Kentucky, holding approximately 40 percent of the total assets, deposits, and loans in the county (*United States* v. *First National Bank and Trust Company of Lexington*, 376 U.S. 665, 668). Security was the fourth largest, with approximately 13 percent of the total assets, deposits, and loans (*ibid.*). In the trust business they had been first and second, together holding 79.62 percent of all trust accounts, which represented, in dollar value, 94.82 percent of all trust assets held by the county's banks (*id.* at 669).

After trial, the district court (Judge Ford) dismissed the complaint (208 F. Supp. 457). The court found that Fayette County, Kentucky, was the relevant geographic area in which to measure the anticompetitive effects of the merger and that commercial banking was the relevant product market (*id.* at 460). But it found no predatory conduct and accepted expert testimony that the merger would not lessen banking competition in the county.

On appeal, this Court reversed and remanded (376 U.S. 665), holding that the merger violated Section 1 because the merging banks had competed with one another in the commercial banking market in Fayette County (*id.* at 671–672). The Court did not reach the questions whether the merger also violated Section 2 (*id.* at 673) and whether trust department services constituted a separate relevant product market (*id.* at 667, n. 3).

2. On remand, the district court, on March 18, 1965, ordered First Security to establish "a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company" at the time of the merger (J.S. 20a).[1] Before the divestiture order was effectuated, Congress enacted the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. (Supp. II) 1828. This statute, *inter alia*, immunized against attack under any antitrust law "other than Section 2" of the Sherman Act any bank merger which, like the one involved here, was consummated prior to June 17, 1963, and had not been dissolved or terminated under an antitrust decree prior to the statute's enactment on February 21, 1966.[2]

On April 28, 1966, the government moved in the district court for an adjudication that the merger vio-

[1] Unless otherwise noted, "J.S." refers to the jurisdictional statement filed by Central Bank and Trust Company in No. 1269.

[2] "Sec. 2(a). Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not

lated Section 2 and for entry of a final judgment of divestiture. Judge Ford having retired, the motion came before Judge Swinford. On February 1, 1967, he denied the motion on two grounds: first, that Judge Ford's decision was the law of the case and there were no unusual circumstances warranting re-examination of the decision by a judge of coordinate jurisdiction; and second, that "Congress by the enactment of the Bank Merger Act" intended "to immunize this particular merger from all further attacks * * *" (J.S. 15a, 17a–19a; 263 F. Supp. 268, 269–270).

On March 31, 1967 the government filed a notice of appeal to this Court. Before the record was docketed, settlement negotiations began. On August 1, 1967, the parties submitted a proposed consent judgment (J.S. 10a–14a) for the district court's approval under a stipulation[3] providing that the decree could be entered if the government did not withdraw its consent within 30 days (later extended 40 additional days (J.S. 9a)). The stipulation also provided for dismissal of the appeal upon entry of the judgment.

The proposed decree enjoined First Security from serving for ten years as trustee or custodian of any non-testamentary trust account created after the judg-

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effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)." 80 Stat. 7, 10; 12 U.S.C. (Supp. II) following 1828.

[3] The stipulation is reprinted as Appendix A to this Motion, pp. 17–18, *infra*.

ment (J.S. 12a at ¶ V).[4] This restriction could be removed after January 1, 1969, but only if First Security could then establish that in the preceding year it acted as trustee of either less than 25 percent by number or less than 50 percent by dollar value of the total assets of all trust accounts held by commercial banks in the county (*id.* at ¶ VI). The judgment also enjoined First Security from acquiring control over or merging with any other commercial bank in Fayette County for ten years (*id.* at ¶ III); and from establishing for a period of five years any additional branch banking office in the county if First Security would thereby own or control more than one-third of the total number of banking offices there (*id.* at ¶ IV).

3. On September 15, 1967, the appellants here, Central Bank & Trust Company ("Central"), a competing bank in Lexington, and Dages I. Boyle, a stockholder in the merged banks, moved to intervene as of right under Rule 24 (a) and (b) of the Federal Rules of Civil Procedure. They urged the court to reconsider its decision that Section 2 had not been violated and to reopen the record for the taking of new evidence. They contended that the public interest required divestiture, which the proposed judgment did not achieve, and that the Bank Merger Act of 1966 was an unconstitutional encroachment by Congress upon the judicial function that deprived the intervenors of rights vested under the original decree. Appellants filed sup-

[4] An exception was provided for those trusts, the settlor of which was an officer, director, advisory director, or employee of First Security.

porting briefs and presented their views to the district court at a hearing on October 2, 1967.

4. On December 29, 1967, the district court entered the consent judgment. It allowed appellants to intervene (J.S. 6a) "to be heard in opposition to the proposed final judgment." The court said that it "seriously question[ed]" the government's "judgment in not permitting this case to go to a final decision by the Supreme Court" (J.S. 6a). But it also commented that it did "not question the right of the United States or any other public agency to compromise litigation in which it is involved" (J.S. 7a). The court held the Bank Merger Act of 1966 to be constitutional, and refused to reconsider its earlier ruling denying relief on the Section 2 claim (J.S. 7a–8a). In approving the proposed judgment, it stated that "[t]here has been no showing of bad faith on the part of the United States" (J.S. 8a). Under the stipulation the entry of the judgment automatically resulted in dismissal of the government's appeal to this Court (Appendix, *infra*, pp. 17–18).[5]

## ARGUMENT

1. Contrary to appellants' contention (J.S. 13–15)—which they did not make before the district court—a person permitted to intervene in a government antitrust suit does not automatically acquire the power to prevent the government and the defend-

[5] Four successive orders, two entered by Mr. Justice Stewart and two by the district court, had extended the United States' time for docketing to and including January 27, 1968.

ants from settling the case through a consent judgment. Here appellants sought and were granted intervention solely to object to the adequacy of the relief provided by the consent judgment and to urge that the Bank Merger Act is unconstitutional. On appeal from the district court's acceptance of the consent judgment, they may argue that, in the light of all the circumstances, the judgment was not an appropriate method of terminating the litigation, and that the district court therefore should have rejected it. (As we show in point 2, below, the consent judgment here represented a reasonable accommodation of conflicting positions and uncertainties, and thus properly was approved.) But intervention did not allow them to control the original parties' disposition of the case.

Even in a private suit, one plaintiff cannot bar another from settling his controversy with the defendant. Whatever dispute the non-consenting plaintiff has with the defendant continues to be litigated, but the settled part of the case must be dismissed. *A fortiori,* permitting a third person to intervene as a co-plaintiff in a government antitrust suit would not bar the government and the defendants from settling the case on whatever terms they deem appropriate. For the authority to prosecute such cases lies with the Attorney General, not with the intervenors; and such authority includes the right to settle. *Swift & Co.* v. *United States,* 276 U.S. 311, 331–332. To allow a private intervenor to veto a consent judgment would elevate his private interest over the public interest represented by the Attorney General. Once the United States

concludes that a particular settlement is preferable to continued litigation of a particular suit and the district court enters a decree embodying the settlement, this public interest must prevail over the narrower personal interests of the intervenor in continuing the government's suit.

Rule 24(a) of the Federal Rules of Civil Procedure, as amended in 1966, confirms this analysis; it contemplates a limited role for intervenors in appropriate circumstances. Unlike the earlier language of the rule, which required that the applicant "is or may be bound by a judgment in the action," a would-be intervenor now needs to show only that "the disposition of the action may as a practical matter impair or impede his ability to protect [his] * * * interest" in the subject matter of the suit. This rule looks to the practical needs of an intervenor and those needs may vary markedly from case to case. Thus, as the Advisory Committee's note to the amended rule, 39 F.R.D. 111, observes, "[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." See, also, D. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 752–756.

In cases such as this—where a private party intervenes in proceedings directed at a proposed consent judgment in a government antitrust suit—it is especially appropriate to limit the intervenors' role, as the district court did, to presenting their views and

appealing.[6] Where an applicant for intervention objects to a proposed decree primarily on the ground that it does not serve the public interest represented by the Attorney General, and its ability to protect its private rights under the antitrust laws is not impaired or impeded, intervention normally is denied.[7] But if the district court permits an opponent of a proposed consent decree to intervene, such intervention properly is limited to permitting him to show how the proposal is inadequate. Such limited participation enables the intervenor fully to present his objections to the court and permits appellate review of the judgment, yet avoids the jeopardizing of the public interest that would result from giving the intervenor a veto power over the consent judgment. Cf. *Swift & Co.* v. *United States*, 276 U.S. at 331–332; *United States* v. *Borden Co.*, 347 U.S. 514, 519.

2. The court below properly approved the consent judgment. That court in 1962 had found that the merger did not violate—and the government was not entitled to relief on the basis of—Section 2 of the Sherman Act. This Court, while reversing the ruling

[6] In contrast, the original parties are estopped from appealing from the decree to which they have agreed. *Swift & Co.* v. *United States*, 276 U.S. 311, 324.

[7] Compare *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, with *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Calif.), affirmed, *per curiam, sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457; *Pioneer National Title Ins. Co.* v. *United States*, 385 U.S. 1022; *City of New York et al.* v. *United States*, Nos. 1141 and 1146, O.T. 1967 (decided April 22, 1968).

that the merger did not violate Section 1, did not reach that issue. After the Bank Merger Act of 1966 eliminated Section 1 as a basis for relief, the district court expressly refused to reconsider its prior Section 2 ruling.

In these circumstances the government was presented with three alternatives. First, it could abandon any effort to obtain further relief in this case. Second, it could attempt to negotiate with the defendant for the most effective relief it could obtain by consent, given the posture of the case. Third, it could press an appeal to this Court on the Section 2 claim.

Had the government dropped its appeal, the proceeding would have been at an end and there would have been no antitrust relief; such a decision would have been wholly within the discretion of the Department of Justice. On the other hand, the probabilities of securing divestiture through appeal were unclear. Although First Security had about half the banking business in Fayette County, it was far from certain that this Court would find an unlawful monopoly. First Security's domination of trust department services in Fayette County offered a far more encouraging case. But even here the government would have had to refute legislative history which admits of an argument that Congress, in 1966, intended to excuse this merger altogether from antitrust liability.[8] More-

[8] The legislative history indicates that Congress intended to forgive this and two other bank mergers from all antitrust liability except for monopolization under Section 2 of the Sherman Act. See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 4; *e.g.*, 112 Cong. Rec. 2333 (daily ed.) (Remarks of Congressman Smith); *id.* at 2334 (Remarks of Congressman Patman); *id.* at 2358 (Remarks of Congressman Ashley).

over, even a successful appeal on this latter issue would not guarantee that a total divestiture, of the sort appellants demand, ultimately would result.

In these circumstances, we submit, the district court properly approved the consent decree. Appellants urged that divestiture was necessary; they offered no other alternative to the negotiated decree. The district court, however, had twice refused—once before and once after this Court's decision under Section 1—to find the violation of Section 2 that would be the legal requisite to a forced divestment. Without such a finding the district court could hardly have insisted upon divestiture, an action to which the defendants obviously would not consent. Indeed, the intervenors, in resting their argument primarily on the claim that the 1966 legislation is unconstitutional, necessarily recognized that a finding of illegality was an essential requisite to the ultimate relief they sought.[9]

Thus the choice before the district court was to approve this decree or to force upon the Attorney General the dilemma of either dropping the case without relief, or investing substantial resources in an appeal that offered far from a certainty of ultimate divestiture. The proffered decree offered substantial relief, once it was recognized that in the immediate circumstances divestiture was simply unavailable. It fully forbade growth by acquisition. It barred any significant expansion into new offices. In the trust area—the aspect of First Security's business that offered the government its best case on appeal—substantial limitations were imposed on the acquisition of new accounts. This, of course, is the focus of competition

[9] Appellants' complaints are printed as Appendices B and C, pp. 19–26 *infra*.

in the trust business, and the limitations imposed on First Security necessarily will diminish its share of Fayette County trust business.[10]

Moreover, the limitation on First Security's acquisition of new trust business may be expected to affect its position in commercial banking generally. In finding that the merger's probable competitive effect in commercial banking violated Section 1, this Court recognized (376 U.S. at 669) the significance of "the multiplicity of extra services in the trust field which the new company could offer * * *." The limitations imposed on First Security will significantly restrict this advantage over its competitors. Furthermore, the additional trust business which the competitors will be able to obtain as a result of such restrictions should enable them to attract a larger share of the banking business as well.

The criticism in the opinion of the district court of the government's action in settling the case cannot fairly be read, as appellants read it, to indicate that the court viewed the consent judgment as improper or inadequate, and was entering it solely because the government had acted in good faith. Rather, those comments are directed at the Attorney General's decision to settle this case instead of prolonging the litigation and risking the possibility of no relief through an appeal based on the Bank Merger Act's exception of Section 2 claims.

[10] The Department of Justice advised the district court that in its judgment the limitations on the trust business would eventually reduce First Security's share "to some 25 percent by number and to some 50 percent by dollar value, and we think that is an effective curb." (Transcript, Oct. 2, 1967, at p. 78.)

The district court was obviously of the view that the Section 2 point should be appealed, but it recognized that it could not compel a government appeal. In the circumstances, the district court properly terminated this protracted litigation by entering a decree which realistically offered as effective relief as was then available.

3. Section 2(a) of the Bank Merger Act of 1966 is not, as appellants urge, unconstitutional The propriety of such legislation has been clear ever since the decision in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421.

That case was an original action in this Court where the State of Pennsylvania contended that a bridge was an unlawful obstruction to navigation of the Ohio River. This Court agreed, and directed that the bridge be elevated or destroyed. (*id.* at 429). Thereafter, but before this Court's decree was implemented, Congress adopted a statute (August 31, 1852) that explicitly "declared" the bridge "to be lawful * * *." When the defendants asserted that the new statute absolved them of the duty of compliance with the Court's decree, Pennsylvania argued (*id.* at 431)—just as appellants do here—that the statute could not "annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff."

This Court, however, rejected the argument because of two factors: (1) that the right in issue—freedom of navigation—was basically a public and not a private right; and (2) that this Court's decree had remained executory up to the time of the legislature's action (*id.* at 431):

The case before us, however, is distinguishable from this class of cases [involving solely private rights], so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.

But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. * * *

See also, The *Clinton Bridge*, 10 Wall. 454; *United States* v. *Klein*, 13 Wall. 128, 146; *Mills* v. *Green*, 159 U.S. 651, 655-656; *Hodges* v. *Snyder*, 261 U.S. 600, 603-604.

Had appellants secured before the 1966 Bank Merger Act a judgment for money damages, Congress, of course, could not have terminated that right by subsequently enacted legislation.[11] But the order of divestiture dealt with the public's rights under the Antitrust laws, a subject over which the Congress has plenary jurisdiction. So long as the divestiture decree remained unimplemented,[12] this jurisdiction carried

[11] The appellant in No. 1270 asserts (J.S. No. 1270, p. 23) that as a shareholder in First Security and its predecessors, the executory divestiture order gave him private rights that Congress could not disturb. However, the district court's order simply provided for a formation of a new bank, as a subsidiary of First Security, and a pro-rata "spin-off" of the subsidiary's stock to First Security's shareholders. Such a transaction would have created no additional values for the shareholders, but simply would have given each of them two stock certificates to represent precisely the same investment as had previously been represented by a single piece of paper.

[12] *Wheeling Bridge*, is not distinguishable (see J.S. No. 1270) on the ground that there the bridge, if destroyed, could immediately have been rebuilt without sanction. To be sure, the formation of First Security would not be immune had it occurred after adoption of the 1966 Act. But the Congressional determination in that Act as to which mergers it would excuse depended upon the date on which they took place. The legislative history shows (see note 8, *supra*) that Congress sought to immunize those bank mergers occurring *before* this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

with it ample authority to decree, as Congress did, that the public interest did not require that this particular merger be adjudged in violation of Section 1 of the Sherman Act.[13]

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
DONALD F. TURNER,
*Assistant Attorney General.*
HOWARD E. SHAPIRO,
DAVID S. J. BROWN,
*Attorneys.*

MAY 1968.

---

[13] There is no substance to appellants' claims that the decree fails to restrict growth of the trust business because it contains exceptions for inter-vivos trusts established by "advisory directors" and for testamentary trusts. If the first exception is in practice abused, or if the second results in unexpected growth, the government's retained powers of visitation (J.S. 13a at ¶ VII) and the court's retained jurisdiction (*id.* p. 14a at ¶ VII) provide ample means of securing such additional relief as may become appropriate as of a later date. Cf. *United States* v. *United Shoe Machinery Corp.*, No. 597, this Term. No present evidence of possible abuse of the "advisory director" provision was offered below, and, insofar as this record is concerned, it appears that nontestamentary accounts provide the most important aspect of First Security's trust business (Transcript, Oct. 2, 1967, at p. 78).

# APPENDIX A

## United States District Court, Eastern District of Kentucky

Civil No. Lex. 1426, Filed: August 7, 1967

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS

### STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The parties consent that a Final Judgment in the form attached may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereto upon the other parties hereto and filing said notice with the Court;

(3) Plaintiff having filed on March 30, 1967, its notice of appeal to the Supreme Court of the United States, the parties hereto consent to the dismissal of

that notice of appeal upon entry of the proposed Final Judgment attached hereto;

(4) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceeding.

Dated: August 7, 1967.

For the Plaintiff:

(S) Donald F. Turner
DONALD F. TURNER,
*Assistant Attorney General.*

(S) Wm. D. Kilgore, Jr.
WILLIAM D. KILGORE, JR.,

(S) Charles L. Whittinghill
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(S) William H. McManus
WILLIAM H. MCMANUS,
*Attorneys, Department of Justice.*

For the Defendants:

(S) Paul A. Porter

(S) Victor H. Kramer

# APPENDIX B

United States District Court, Eastern District of Kentucky

Civil No. Lex. 1424

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS

## PLAINTIFF-INTERVENOR COMPLAINT

Plaintiff-Intervenor, Central Bank & Trust Co., for its intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Central Bank & Trust Co., Lexington, Kentucky, is a corporation duly organized and existing under the laws of the Commonwealth of Kentucky, and is authorized to, and is, engaging in the commercial banking and trust business, and has engaged in such business in the City of Lexington, Fayette County, Kentucky, for over 25 years.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judg-

ment and order was entered pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965 final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89–356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Act, even though the United States Supreme Court

judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the V[th] Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Central Bank & Trust Co., has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Central Bank & Trust Co., and the Bank of Commerce and Trust Company, of Lexington, Kentucky, and the Citizens Union National Bank & Trust Co., of Lexington, Kentucky, have heretofore requested the United States to withdraw its consent to the proposed final judgment now pending before this Court and to raise the constitutional questions and continue to prosecute the defendants herein for violation of Section 2 of the Sherman Act. The United States has declined to do so. Copies of the letters of the respective banks requesting said action on the part of the United States are attached hereto as Exhibit "A" and made a part hereof.

(9) Plaintiff-Intervenor, Central Bank & Trust Co., is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Central Bank & Trust Co., demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. Its cost herein expended and such other relief to which it may be entitled.

Respectfully submitted,

EARL S. WILSON,
*Lexington, Kentucky.*
EDWIN F. SCHAEFFER,
*Lexington, Kentucky.*
EARL W. KINTNER,
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# APPENDIX C

## United States District Court, Eastern District of Kentucky

### Civil No. Lex. 1424

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS.

### PLAINTIFF-INTERVENOR COMPLAINT

Plaintiff-Intervenor, Dages I. Boyle, on behalf of himself and First National Bank and Trust Company of Lexington, and Security Trust Company, for his intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Dages I. Boyle, is a citizen and resident of Fayette County, Kentucky, is a stockholder in defendant Security Trust Company, owning stock therein as appears of record on its corporate books, and is also a stockholder of First Security National Bank and Trust Company of Lexington, owning stock therein as appears of record in its corporate books and was prior to and at the time of merger of defendants a stockholder in each of said banks.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judgment and order was entered pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965, final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89-356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that

certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Sherman Act, even though the United States Supreme Court held in a final judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the Vth Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Dages I. Boyle, has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Dages I. Boyle, is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Dages I. Boyle, demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. His cost herein expended and such other relief to which he may be entitled.

Respectfully submitted,

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Dated: Sept. 15, 1967.

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No. 1269

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

---

**On Appeal From the United States District Court for the Eastern District of Kentucky**

---

## BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1269

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

**On Appeal From the United States District Court for the Eastern District of Kentucky**

## BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

Appellant moved to intervene in this case to oppose entry of a consent decree proposed by the United States and appellee banks and to urge the court to enter instead a decree of divestiture. The court granted appellant's motion for intervention. In the same order, however, it terminated the action and directed that the consent decree be entered. Appellees' defense of the court's action warrants a brief response.

### ARGUMENT

(1) The United States argues that the consent judgment afforded reasonable relief "once it was recognized that in the immediate circumstances divestiture was simply unavailable" since no court had yet found the

combination in violation of Section 2 of the Sherman Act. (Mot. to Aff. 11). Acknowledging that First Security's 90 percent "domination of trust department services in Fayette County offered a far more encouraging [Section 2] case [than the bank's 50 percent share of all banking services]," the United States suggests that "even here [it] would have had to refute legislative history which admits of an argument that Congress in 1966 intended to excuse this merger altogether from antitrust liability" (*id.* at 10).[1] The short answer is that there are no impediments to divestiture (J.S. 22 fn. 7), and the legislative history of the Bank Merger Act of 1966 makes abundantly clear that appellee banks were not intended to be absolved from the consequences of Section 2 violations. See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3 (1966). Indeed, the Government's own reading of this legislative history is that it "indicates that Congress intended to forgive this and two other bank mergers from all antitrust liability *except for monopolization under Section 2 of the Sherman Act*" (Mot. to Aff. 10 fn. 8, emphasis added).[2]

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[1] Appellee banks themselves apparently recognize the strength of the Section 2 claims in the trust field, stating that "the only violation of Section 2 that could realistically have been expected would have related to the sub-market of corporate trust services, . . ." (Mot. to Aff. 11).

[2] Congress was well aware of the Section 2 count in the complaint against appellee banks. For example, Representative Patman inserted into the record a chart which pointed out that the suit against appellee banks alleged "violations of secs. 1 and 2 of the Sherman Act." That chart also highlighted the banks' argument to the district court "that a preliminary injunction should not be issued because [they] recognized that should the Government prevail on the merits, divestiture would be appropriate relief which [they] were prepared to effectuate." *The 6 Challenged Bank Mergers S. 1698 Would Protect,* Hearings on S. 1698 (and related bills) before a Subcommittee of the House Committee on Banking and Currency, 89th Cong., 1st Sess., chart following p. 38 (1965).

Beyond this, the consent decree entered by the district court does not provide adequate relief in any sense of that phrase (see J.S. 22-24). The main portion of the decree restricts First Security's acquisition of new *non-testamentary* trust accounts. Appellant submitted to the district court an affidavit alleging that this restriction was insubstantial because First Security's principal trust business is "testamentary" (Doc. 222, Kincaid Affidavit, p. 5). Appellee banks—which surely are in the best position to know the facts—have never controverted the affiant's statement (see, *e.g.*, Mot. to Aff. 11 fn. 18).

The Government, citing only the argument of its counsel in the court below, observes merely that "it *appears* that nontestamentary accounts provide the most important aspect of First Security's trust business" (Mot. to Aff. 16 fn. 13, emphasis added). In other words, on this crucial aspect of the decree, the United States apparently agreed to limit the scope of the prohibition without knowing the precise facts.[3] The consent decree, in short, is inadequate and contrary to the public interest, for, as the court below found, it effected a "ninety percent capitulation" to the defendants by the United States (J.S. App. B, p. 7a).

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[3] Appellant also argues that the decree's prohibition against acquiring new non-testamentary accounts is itself inadequate because accounts of advisory directors are excluded from the ban (J.S. 24). Appellees contend that if this exception is abused relief can be had at "a later date" (Gov't Mot. to Aff. 16 fn. 13; Bank Mot. to Aff. 10 fn. 16). This contention misses the point. The court's retained jurisdiction to modify consent decrees is not intended to substitute for entry of an adequate decree in the first instance. It is intended merely to redress unforeseen contingencies. Patent loopholes, such as this one, have no place in any decree reasonably calculated to pry open to competition a market foreclosed by an unlawful monopolization.

(2) Appellant also argues that the district court erred in permitting it to intervene as of right while simultaneously terminating the litigation and entering the consent decree appellant had intervened to oppose (J.S. 13-15). The Government admits that these facts raise "a novel issue under the amended rules of civil procedure."[4] Moreover, in the past the Government has acknowledged that intervenors have a right to participate in settlement negotiations and, if unsatisfied, to "insist on a litigated proceeding" (J.S. 14). Without mentioning its previous position the United States now asserts that the rights of an intervenor may be limited to presenting argument and appealing (Mot. to Aff. 6-7).

The Government's shifting position on this question underscores its importance in the proper enforcement of the antitrust laws. It is of course true that when the Government argued that intervenors have equal rights with original parties, it was urging this Court not to permit intervention in antitrust cases. The Court, however, disagreed and held in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967), that persons situated in appellant's position have a right to intervene and be heard on questions of relief—"the entire merits of the case must be reopened to give [the applicants] an opportunity to be heard as of right as intervenors . . . ." In order for that right to be meaningful, an intervenor must be able

---

[4] Letter from Solicitor General Griswold to Honorable John F. Davis (dated April 18, 1968), requesting an extension of time for responding to the jurisdictional statements in this appeal and No. 1270.

to do more than present argument (in the same manner as an *amicus curiae*) and appeal if dissatisfied with the result.

The Government contends, as a matter of policy, that it and the defendants must be permitted to settle antitrust cases "*on whatever terms they deem appropriate,*" for "[t]o allow a private intervenor to veto a consent judgment would elevate his private interest over the public interest represented by the Attorney General" (Mot. to Aff. 7, emphasis added). This argument is little more than a rehash of the Government's original reasoning in *El Paso* that intervention is not appropriate in antitrust cases.[5] Furthermore, in this particular case, the argument ignores the fact that appellant sought intervention below for the express reason that the United States was not adequately protecting the "public interest" in competition by agreeing to the consent decree (see Central's Complaint, reprinted in Gov't Mot. to Aff. App. B, pp. 19-22). The court below properly granted intervention. It erred, however, in not thereafter affording appellant the rights of a party plaintiff.

---

[5] Compare the following statements with the language quoted above:

"The congressional purposes would be thwarted if private antitrust suitors had standing to challenge the government's handling of its cases and to usurp its function . . ." (Brief for the United States in Nos. 4, 5 and 24, O.T. 1966, p. 37).

"[W]e submit, it has never been thought the proper office of the judiciary to review the wisdom of the Attorney General's decision to settle rather than to sue" (*id.* at 36).

## CONCLUSION

For the foregoing reasons and those set forth in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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May 1968

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

No. 1270

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

**On Appeal From the United States District Court for the Eastern District of Kentucky**

## BRIEF FOR APPELLANT DAGES I. BOYLE IN OPPOSITION TO MOTIONS TO AFFIRM

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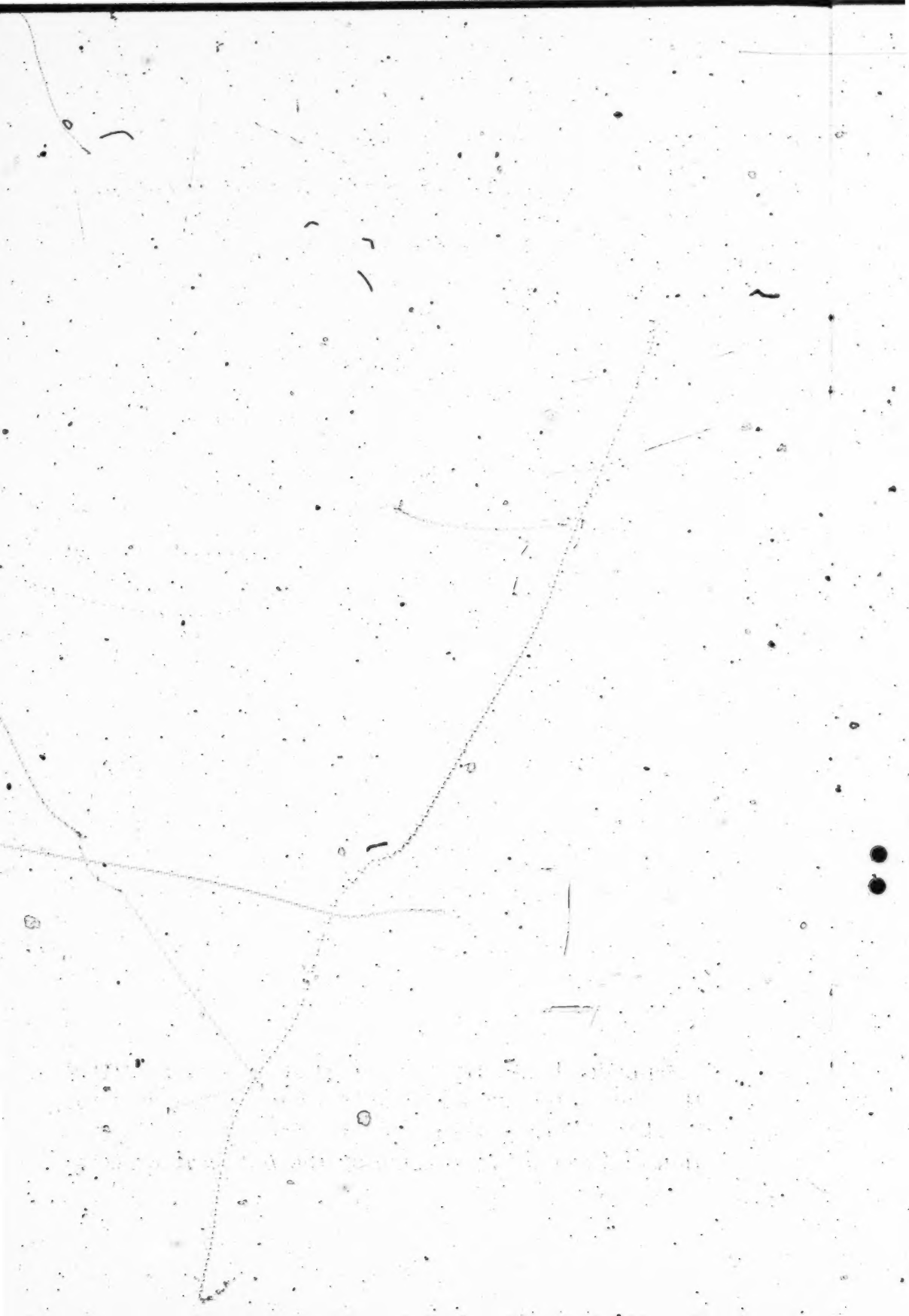

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1270

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DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

---

**On Appeal From the United States District Court for the Eastern District of Kentucky**

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## BRIEF FOR APPELLANT DAGES I. BOYLE IN OPPOSITION TO MOTIONS TO AFFIRM

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### SEPARATION OF POWERS

Appellee banks try to support their argument that the Bank Merger Act of 1966 (sometimes called the "Act") "Does Not Violate The Principle of Separation of Powers" by construing the Act as if it recog-

nized the validity and integrity of the final court judgments holding that the Lexington consolidation violated Section 1 of the Sherman Act, but forgave the violation. Congress did not so write this Act.[1] The banks seek to rewrite the Act because they seem to concede that the Act construed in accordance with its clear, unambiguous, literal language is unconstitutional.

The Act does not employ the words "forgiveness" or "immunization" or any similar words. It conclusively presumes (adjudicates) that the consolidation did *not* violate section 1 of the Sherman Act *despite the holding of this Court to the contrary.* This language was *deliberately* chosen by Cogress.

The Act usurps (1) the exclusive judicial power to determine whether a statute has been violated, and (2) the exclusive power of the courts to vacate on proper grounds final court judgments.

Even if the statute had attempted to forgive violations of Section 1 of the Sherman Act by vacating final judgments, it would clearly be unconstitutional. See cases cited at pages 17-22 of Boyle's Jurisdictional Statement. As shown by some of the foregoing authorities a final judgment convicting a citizen of a crime cannot be affected by subsequent legislation forgiving the *public* offense. *A fortiori,* the final judgment of this Court and the final judgment of the district court fixing valuable private rights and public rights cannot be vacated by the Bank Merger Act of 1966.

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[1] The rules of statutory construction require that unambiguous language be given full force and effect. See 50 Am. Jur. § 225, page 204.

The *Wheeling Bridge*[2] case has already been distinguished from this case on several grounds. It will not be further discussed herein, except to point out that the banks' analysis of that case fails to recognize the significant fact that the new statute in that case repealed by implication the earlier statute which was the *sole* reason for the provision of the judgment that *prohibited* "defendants against any reconstruction or continuance" of the bridge; whereas, the Act did not repeal section 1 of the Sherman Act which was the sole reason for the divestiture requirement of the final judgment in this case. Congress simply performed the judicial functions of adjudicating (a) that Section 1 of the *unrepealed* Sherman Act was not violated and (b) that the final judgment of this Court and the final judgment of the district court be vacated.

The contention of the bank that Congress can vacate an *unexecuted* final judgment (which Section 2(a) of the Act attempts to do) is completely refuted by cases cited at pp. 18-20 of Boyle's jurisdictional statement.

Boyle would not concede, as the banks state he would, that the hypothetical statute mentioned in the footnote at page 20 of their Motion, would be valid. Such statute would be unconstitutional, but there is no reason to pursue that irrelevant question.

## DEPRIVATION OF VESTED RIGHTS

The banks state that Boyle contends that Congress "by enacting 'forgiveness' legislation" unconstitutionally divested private rights.[3] Boyle has always con-

---

[2] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (19 How.) 421.

[3] The "foregiveness legislation" theory is an afterthought. See Boyle's Jurisdictional Statement, p. 13; Doc. 235, p. 2.

tended that the Act clearly states that the consolidation did *not* violate Section 1 of the Sherman Act. He has never contended that the Act "forgives" the violation of that Section found by this Court.[3] Furthermore, if the Act were rewritten so that it could be appropriately described as "forgiveness legislation," such Act would nevertheless unconstitutionally (1) usurp exclusive judicial powers; (2) impair vested private rights; and (3) arbitrarily discriminate between insured banks and others. In short, the statute would be unconstitutional if rewritten as suggested by the banks, but this is an irrelevant academic question.

The banks allege that Boyle construes the "Order of March 18, 1965" as directing "that all former stockholders be returned to their original position in each bank." *Boyle has never made any such absurd construction of that Order.*[4] Some of the "former stockholders" have sold their stock, and some of them are deceased. Obviously, they cannot be restored to their "original positions" because there have been changes in depositors, assets, directors, etc. However, that order (as clarified by the Order of April 29, 1965) fixed in great detail the rights of stockholders, including Boyle, and the rights of the two original constituent banks which were required to be re-established as

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[3] Boyle also contends that the fact that the Act adjudicates that various transactions "involving an insured bank" prior to June 17, 1963 did not violate certain unrepealed antitrust laws preempts the exclusive power of the judiciary to adjudicate whether those statutes were violated and, as a result, the Act is unconstitutional in its entirety. See Boyle's Jurisdictional Statement, pp. 22, 23, 27.

[4] Boyle's construction of the "Order of March 18, 1965" is at pp. 11, 12, 23 and 24 of his jurisdictional statement. Furthermore, the Order speaks for itself as to the private rights established by it.

separate corporate entities. Boyle's right to ownership of stock in each of these banks is recognized and described by the banks themselves as "[h]is relative equity in the two banks after execution of the decree" (footnote page 20, appellee banks' Motion). This is one of the private property rights fixed by the final court judgment which the Bank Merger Act of 1966 unconstitutionally attempts to destroy by vacating that judgment.

Boyle intervened to enforce and protect private rights vested by that judgment, and the banks did not by answer deny a single allegation of his intervening petition. Boyle's intervention to protect private rights under a final judgment does not set any precedent as to the rights of stockholders or others to intervene in antitrust actions prior to final judgment.

## BOYLE'S STANDING TO SUE

Boyle, whose private rights would be destroyed by the Bank Merger Act of 1966, is entitled to attack the constitutionality of the Act in its entirety as a means of protecting his rights.[5] See 16 Am. Jur. 2d § 119, page 310. Furthermore, Boyle also intervened on behalf of the two appellee insured banks and is entitled to attack the constitutionality of the Act as it affects the rights of such banks.

## THE DISTRICT COURT HAD NO JURISDICTION TO ENTER THE CONSENT JUDGMENT

The above point, which is urged at pages 28-29 of Boyle's Jurisdictional Statement, is so sound that the appellees have ignored it rather than attempt to respond to it.

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[5] Significantly, the existence of arbitrary discrimination is not denied.

## CONCLUSION

For all of the foregoing reasons and those set forth in the Jurisdictional Statement, this Court should note probable jurisdiction. Unless this Court takes jurisdiction, the opinion of the district court will set a dangerous and incorrect precedent of tremendous national importance.

Respectfully submitted,

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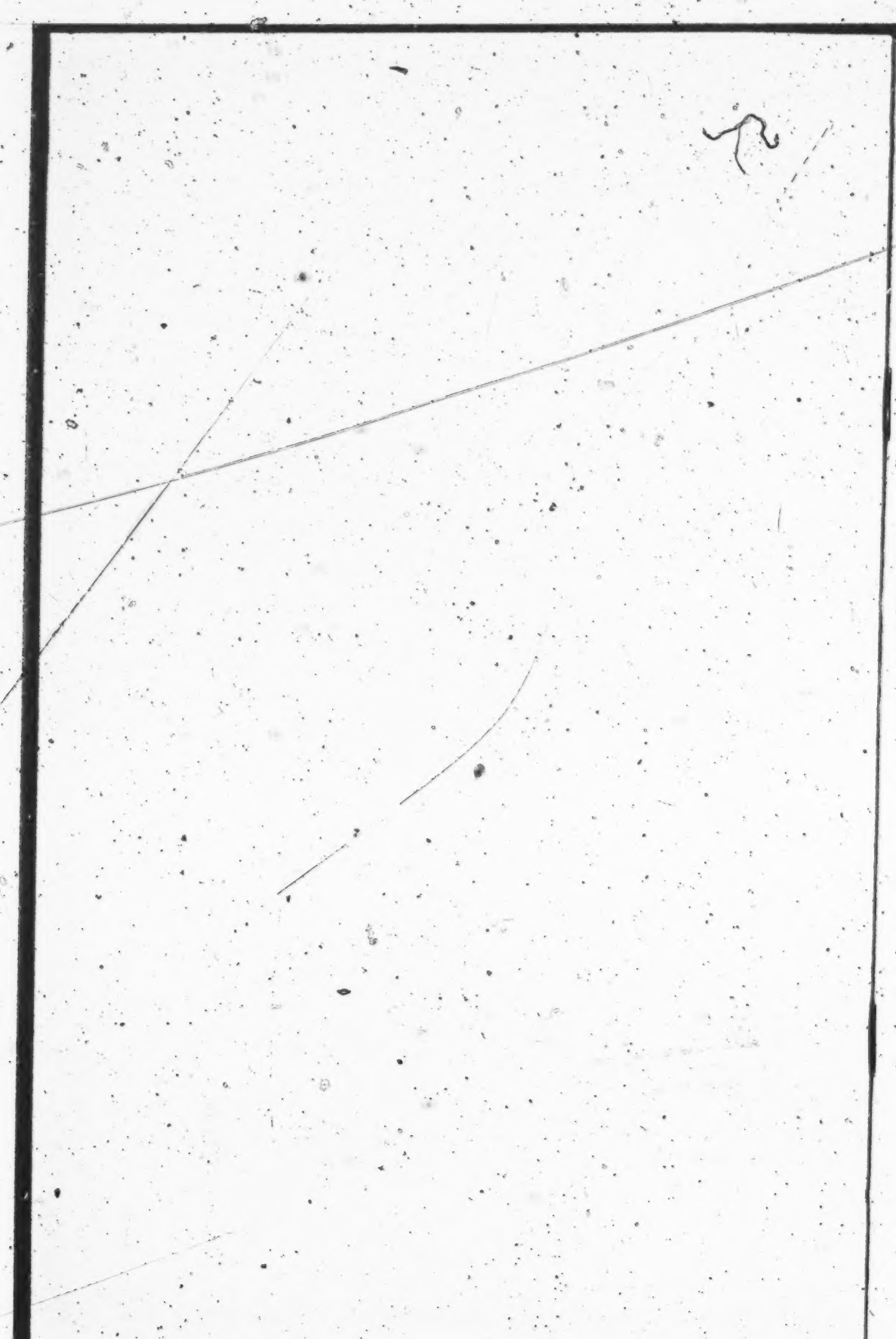
May 1968



SUPREME COURT, U. S.

Office-Supreme Court
FILED
JUN 19 1968
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No. 1269

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

**On Appeal From the United States District Court for the Eastern District of Kentucky**

## PETITION FOR REHEARING

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UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

**On Appeal From the United States District Court for the Eastern District of Kentucky**

## PETITION FOR REHEARING

Pursuant to Rule 58(1) of the Revised Rules of this Court, appellant respectfully petitions for rehearing of the judgment of this Court (dated May 27, 1968) affirming *per curiam* the decision below.

### REASONS FOR GRANTING REHEARING

The decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), offered, for the future, high promise of a reasonable accommodation of the rights of intervenors in antitrust cases. In less than eighteen months that promise has been seriously

diluted by a series of lower court decisions uniformly denying applications for intervention. If the decision below is permitted to stand, the law, in practical effect, will have reverted to its pre-*El Paso* status.

The court below, while paying lip service to the teaching of *El Paso* and permitting appellant to intervene, did not afford appellant any of the rights of a party (except the right of appeal). Appellant's situation therefore was little improved over that of the applicants who had been denied intervention in other cases: Despite *El Paso,* applicants for intervention in antitrust cases have not been allowed to meaningfully participate in and affect the outcome of antitrust cases.

This case provides an excellent vehicle for calling a halt to this backward trend. Intervention was granted, so the threshold question of the applicability of *El Paso* is not involved. The inadequacy of the consent decree appellant intervened to oppose is clear (J.S. 21-24). And, because of the overwhelming evidence that the challenged consolidation is in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2—the consolidated banks control over 90 percent of the relevant corporate trust market—the Court could reverse the decision below without inhibiting the Government in any way from settling close cases.[1]

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[1] In this connection it is significant that following the Court's *per curiam* affirmance in this case, the Department of Justice (on May 30, 1968) issued merger guidelines which emphasize that (¶ 2)—

> "[m]arket structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, i.e., by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes

## CONCLUSION

The petition for rehearing should be granted, probable jurisdiction should be noted, and this Court's May 27, 1968, judgment of *per curiam* affirmance should be vacated.

Respectfully submitted,

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June 1968

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of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct of an economically undesirable nature."

The second sentence of that quotation accurately describes the market structure involved in this case, and only divestiture can effect an adequate remedial impact.

**Certification**

I certify that the petition for rehearing is presented in good faith and not for delay.

SIDNEY HARRIS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1270

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DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

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On Appeal From the United States District Court for the Eastern District of Kentucky

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## PETITION FOR REHEARING

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### PRELIMINARY STATEMENT

Boyle and the two banks he represents file this petition solely for the purpose of urging that this Court should in the interest of justice and sound legal precedent write a complete, reasoned opinion on the merits.

This is necessary because of the patent errors and inconsistencies in the opinion of the district court (280 F. Supp. 260, J.S. pp. 2a-8a).[1]

Affirmance of the district court's decision by the Opinion *per curiam* of this Court without discussion of the law or facts amounts to an approval or adoption of its opinion by this Court. See *Ohio* v. *Price,* 360 U.S. 246; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley,* 179 F. Supp. 944; and *State of Louisiana* v. *Murphy,* 173 F. Supp. 782.[2]

Unless this Court makes available in an opinion the reason for its decision, the law will be in a state of confusion as to:

(a) When a judgment is final;

(b) When a court judgment is free, if ever, from impairment or vacation by subsequent legislation;

(c) Whether there is a procedure for vacating a final court judgment other than that set forth in the Federal Rules of Civil Procedure, particularly Rule 60(b) (See J.S. p. 29);

(d) Whether a district court may ignore a mandate of this Court which has not been withdrawn or modified by this Court (See J.S. pp. 28-29); and

(e) Whether a consent judgment to which intervening parties have not consented may be entered.

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[1] J.S. refers to Boyle's Jurisdictional Statement. The so-called consent judgment appealed from is "made a part of the opinion." J.S. p. 2a.

[2] The foregoing cases have not been previously cited to the Court in this case.

## SPECIFIC REASONS WHY THIS COURT SHOULD WRITE AN OPINION ON THE MERITS

1. The most compelling reason for an opinion on the merits arises out of the following facts and circumstances:

The district court rested its holding that the Bank Merger Act of 1966 *constitutionally* (a) *impaired* valuable private rights fixed by the March 18, 1965 judgment[3] entered in accordance with the final judgment of this Court (376 U.S. 665) and (b) vacated those judgments solely upon the fallacious holding that the March 18, 1965 judgment "was not final" because it retained the case on the docket for future directions. The district court said (J.S. pp. 7a-8a):

> "The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. *The litigation was not final,* notwithstanding the fact that an order directing divestiture had been entered, as the order itself retained the case on the docket for the purpose of guiding and determining whether or not any action on the part of the defendants contravened the directive of the order." (Emphasis added)

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[3] The March 18, 1965 order of divestiture and the clarification order of April 29, 1965 are set forth in J.S. pp. 20a and 22a, and are collectively referred to herein as the "March 18, 1965 judgment." It appears that this was the only unappealable and unreviewable judgment to which Section 2(a) of the Bank Merger Act of 1966 could apply. Other judgments in bank merger cases in existence at the time of enactment of this Act were subject to appeal or rehearing and thus, private rights thereunder could be affected by subsequent legislation. See cases cited in J.S. pp. 17-18. Therefore, this case is entirely different from other bank merger cases pending at the time of enactment of the Bank Merger Act of 1966. Enforcement of private rights under the March 18, 1965 judgment would not affect such other litigation.

In short, the district court held the Bank Merger Act of 1966 constitutional as applied to the aforesaid judgments solely because of its erroneous conclusion that the March 18, 1965 judgment "was not final." The holding that the March 18, 1965 judgment "was not final" is directly contrary to, and *if approved by the Opinion per curiam overrules, Brown Shoe Co.* v. *United States,* 370 U.S. 294, other cases cited in J.S. pp. 19-21, and *Stovall* v. *Banks,* 77 U.S. 1036, (not previously cited) which uniformly hold that retention of a case on the docket for future directions does not destroy the finality of the judgment.[4]

Furthermore, *the holding that the March 18, 1965 judgment "was not final" is contrary to and inconsistent with the district court's own holding that the so-called consent judgment (entered 2⅔ years later) is a "final judgment."* The district court's opinion calls that judgment the "final judgment" *nineteen* times. See J.S. pp. 10a-14a. However, *the consent*

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[4] In the *Stovall* case this Court said:

"It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. *It has never been doubted that such decrees are final.* They are all that is necessary to give to the successful party the full benefit of the judgment. In 2 Daniell's Chancery Practice, 641, 642, the effect of allowing the privilege of making such applications to the *Chancellor,* is stated to be no alteration of the final nature of the decree. Says the author, 'A decree with such a liberty reserved is still a final decree, and, when signed and enrolled, *may be pleaded in bar to another suit for the same matter.*' So in *Mills* v. *Hoag,* 7 Paige, 19, it was said that 'a decree is not the less final in its nature, because some future orders of the court may possibly become necessary to carry such final decree into effect.'" (emphasis added)

*judgment also provides for retention of the case on the docket in the same language and for the same purposes that the March 18, 1965 judgment did.* See J.S. pp. 14a and 22a for exact language by which each judgment retained the case on the docket.[5] The consent judgment is not final *if* the March 18, 1965 judgment is not final.

*If the March 18, 1965 judgment is a final judgment, as clearly it is, then the Opinion per curiam overrules the Wheeling Bridge case (59 U.S. 421) and other cases cited in J.S. pp. 17-23 which (without exception) hold that private rights vested by a final judgment cannot be impaired by legislation enacted after the time for appeal or review of that judgment expired.*

The conclusion is inescapable that either the *Brown Shoe* line of cases or the *Wheeling Bridge* line of cases is overruled by the Opinion *per curiam*. However, it is impossible to ascertain which one is overruled because the *per curiam* opinion of this Court gives no indication as to which of the inconsistent holdings of the district court is adopted.

*The uncertainty as to which line of decisions is overruled and the resulting confusion establishes the necessity for a complete, reasoned opinion on the merits.*

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[5] The district court correctly recognized that a *final* judgment that fixes private rights cannot be vacated or impaired by legislation enacted after expiration of the time for appeal or review of the final judgment. See cases cited in J.S. 17-18. However as shown by the *Brown Shoe* case and other cases cited above, the district court erred when it held that the March 18, 1965 judgment was not "final." Apparently, except for this error, the district court would have held the *Act unconstitutional as applied to the March 18, 1965 judgment*. This error was prejudicial. It was decisive of the case before the district court, and should be corrected.

2. Other reasons an opinion on the merits is essential are as follows:

(a) The district court's erroneous holding that the Bank Merger Act of 1966 immunizes the consolidation of the Lexington banks against attack for violation of Section 2 of the Sherman Act is directly contrary to *express* provisions of Section 2(a) of the Bank Merger Act of 1966 and should be corrected.

(b) The district court's erroneous holding that Congress by creating the conclusive[5] presumption[6] (adjudication) that the consolidation of the Lexington banks did not violate Section 1 of the Sherman Act was a determination of a "question of fact" (J.S. p. 8a) should be corrected. It was not proper for Congress to adjudicate *whether that statute had been violated* because, irrespective of whether that question was "a question of fact" it had already been resolved by the final judgment of this Court, and as stated by Chief Justice Warren in the *Brown Shoe* case, that question was "forever foreclosed" by the final judgment of this Court. It was *res adjudicata.*

(c) The district court's erroneous holding that the *Wheeling Bridge* case upholds the *constitutionality* of the Bank Merger Act of 1966 as applied to the March 18, 1965 judgment and the final judgment of this Court (J.S. p. 8a) should be corrected. That case establishes that the Act is *unconstitutional* insofar as it impairs private rights fixed by those final judgments because it held that a private right to payment of court costs awarded by a final decree of this Court could not be impaired by legislation enacted subsequent to the final decree *even though the enactment occurred prior to*

[5] See Section 2(a) of the Bank Merger Act of 1966.

*satisfaction or execution of the decree.* See other cases in J.S. pp. 23-25.

(d) The district court's opinion fails to state any valid reason why the private rights of Boyle and the banks he represents cannot be enforced. The Petition of First Security to clarify the March 18, 1965 judgment[7], the Response of the United States[8] and the March 18, 1965 judgment (which includes the April 29, 1965 Clarification Order) *speak for themselves* and leave no room for doubt that substantial private rights were fixed by the March 18, 1965 judgment which ordered divestiture "without delay." See J.S. pp. 11-12, 23-25 for summarization of these rights.

Appellee banks in their Motion to Affirm recognize and describe Boyle's private rights as "[h]is relative equity in the two banks after execution of the decree." This "equity" is a bundle of private rights fixed by the March 18, 1965 judgment.

Similarly, the equities of the two banks required to be recreated or re-established are bundles of private rights *fixed by that judgment.*

Appellee banks in their Motion to Affirm at p. 19 admit:

> "The Court acknowledged in *Wheeling Bridge* that, as a general principle, when a court renders a final judgment with respect to the private rights of parties, the rights become *absolute* and *must be enforced.*" (Emphasis added)

However, for one nebulous reason or another, Boyle's rights and the rights of the banks he represents are

[7] Doc. 186.

[8] Doc. 188.

not being "enforced," although Boyle in his intervening complaint specifically requested enforcement of these rights. *No court has yet cited a case or stated a sound legal or logical reason why these rights cannot be enforced. They should be enforced.*[9] *It is respectfully submitted that this Court should, in view of the errors in the district court's opinion, set forth in an opinion on the merits, the legal principles which underlie its decision.*

## CONCLUSION

For reasons stated herein and in the Jurisdictional Statements of Boyle and Central Bank & Trust Co., (No. 1269), this Court should withdraw its Opinion *per curiam* and note probable jurisdiction. The opin-

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[9] If there was ever a case, where a "divestiture" should be carried out, it is this case. The record is clear that the banks consolidated knowing that the United States believed the consolidation would violate the antitrust laws, and that it would sue to enjoin it. However, the banks claim to have "consummated" the consolidation during the morning of March 1, 1961 just before the suit was filed that day. They knew at that time that representatives of the United States were in Lexington for the purpose of filing the injunction suit. See J.S. pp.7-9 and "The 1966 Amendment to the Bank Merger Act", Vol. 66, Columbia Law Review, pp. 764, at 775. *There is no merit whatsoever in the contention that the banks innocently entered into this consolidation believing that the Sherman Act would not apply.* The record refutes that contention. It would be a rank miscarriage of justice to fail to enforce the March 18, 1965 final judgment of the district court and the final judgment of this Court.

ion of the district court should not be allowed to become the law of the land.

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June 1968

**Certificate**

I certify that this Petition for Rehearing is presented in good faith and not for delay.

Earl S. Wilson

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1967.**

CENTRAL BANK & TRUST CO. *v.* UNITED STATES ET AL.; and

BOYLE *v.* UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

Nos. 1269 and 1270. Decided May 27, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE WHITE would note probable jurisdiction and set these cases for oral argument.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.